(24,194)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 22.

PENNSYLVANIA RAILROAD COMPANY

vs.

W. F. JACOBY & CO.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

	Page
Transcript of record from the district court of the United States for the eastern district of Pennsylvania	1
Docket entries	1
Writ of error	3
Petition	4
Exhibit "A"—Supplemental report of Interstate Commerce Commission, Harlan, C.	12
Supplemental orders of Interstate Commerce Commission	25
Exhibit "B"—Report of Interstate Commerce Commission, Harlan, C.	29
Orders of Interstate Commerce Commission	36
Order of court directing defendant to file plea, &c.	38
Demurrer	38
Opinion sur demurrer, Thompson, J.	40
Stipulation of counsel as to date of filing, &c.	55
Plea	56
Jury	56
Verdict	56

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 16, 1916.

Page

Bill of exceptions 57
Testimony of William F. Jacoby 58
Report of Interstate Commerce Commission, Harlan, C. 60
Order of Interstate Commerce Commission 66
Plaintiff rests 70
Testimony of Frank C. Stratton 72
Edmund C. Haley 76
James F. Clennon 77
Edmund C. Haley (recalled) 91
R. B. Freeman 95
Edmund C. Haley (recalled) 101
Statement showing discrimination, &c. 104
Statement showing discrimination, &c. 105
Testimony of William F. Jacoby (recalled) 106
Sidney J. Sanders 110
Defendant rests 111
Testimony of Isaac C. Weber 112
S. L. Clark 120
Statement showing distribution of cars 121
Statement showing aggregate ratings, &c. 122
Testimony of Edmund C. Haley (recalled) 123
Charge of the court, Thompson, J. 124
Stipulation of counsel as to bill of exceptions 140
Judge's certificate to bill of exceptions 141
Motion for judgment *non obstante veredicto* 141
Order of court refusing new trial, &c. 142
Order of court fixing counsel fees, &c. 142
Præcipe for judgment 143
Judgment 143
Petition for writ of error 144
Order of court allowing writ of error 144
Assignments of error 145
Præcipe sur transcript of record 156
Clerk's certificate 156
Order of argument and submission 157
Certificate of questions 157
Clerk's certificate 159
Writ of certiorari 160
Clerk's return to writ of certiorari 161

DOCKET ENTRIES.

IN THE
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA.

June Session, 1912.

Wm. A. Glasgow, Jr. — W. F. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company,

2008

vs.

John G. Johnson — Pennsylvania Railroad Company.

Proceeding to enforce orders of Interstate Commerce Commission.

1912 July	19	Petition filed. Order directing defendant to plead, answer or demur within thirty days of service of copy of this order filed.
" "	27	Proof of service of petition and order filed.
" August	8	Order for the appearance of John G. Johnson, Esquire, for defendant filed.
" "	17	Stipulation that defendant may plead, answer or demur on or before September 18, 1912, and that case be placed on trial list subject to such plea &c. filed.

"	September	18	Demurrer filed.
"	October	4	Argued.
"	November	12	Opinion, Thompson, J., overruling demurrer filed.
"	"	16	Plea filed.
"	December	7	Order to place case on trial list filed.
1913	March	3	Jury called.
"	"	4	Verdict for plaintiff $28,572.54.
"	"	8	Plaintiff's bill of costs filed.
			Motion for judgment *non obstante veredicto* filed.
			Motion and reasons for new trial filed.
"	"	24	Argued sur motions for new trial and for judgment N. O. V.
"	April	4	Order refusing motions for new trial and for judgment N. O. V. filed.
"	"	8	Bill of Exceptions filed.
"	May	19	Order allowing counsel fees and granting exception filed.
"	"	21	Præcipe for judgment filed. Judgment accordingly.
			Assignments of error filed.
			Petition for writ of error and order of allowance filed.
"	"	23	Bond sur writ of error in sum of $57,145.08 and order of approval filed.
			Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
			Citation allowed and issued.
			Præcipe sur transcript of record filed.
"	"	26	Citation returned "service accepted" and filed.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania,

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you between W. F. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company, plaintiff, and Pennsylvania Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable J. Whitaker Thompson, Judge of the District Court of the United States, at Philadelphia, the 23rd day of May, in the year of

(SEAL) our Lord one thousand nine hundred and thirteen.

GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before THOMPSON, *J.*
Allowed—
BY THE COURT.
Attest—
GEORGE BRODBECK,
Deputy Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY & COMPANY,
Petitioners,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

PETITION.
Filed July 19, 1912.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioners, W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY

& COMPANY, having their principal place of business in the City and County of Philadelphia, and State of Pennsylvania, and who are citizens and residents of the City of Philadelphia, State of Pennsylvania, in the Eastern District of Pennsylvania, humbly complaining show your Honors:

I.

Your petitioners are lawfully and rightfully entitled to receive, and do hereby claim from the defendant above named the sum of Twenty-one thousand ninety-four dollars and thirty-nine cents ($21,094.39) with legal interest from June 28th, 1907, to June 1st, 1912, amounting to Six thousand, two hundred and thirty-eight dollars and sixteen cents ($6,238.16), being the sum of Twenty-seven thousand, three hundred and thirty-two dollars and fifty-five cents ($27,332.55) with legal interest thereon from June 1, 1912, as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11th, 1912, a copy whereof is hereto attached, marked "Exhibit A", and prayed to be made and read as a part hereof, and in accordance with the several Acts of Congress in such case made and provided; and the defendant justly and legally owes to petitioners the sum above set forth, together with legal interest thereon from June 1st, 1912, and a reasonable attorney's fee to be taxed as part of the costs against defendant.

II.

The defendant prior to any and all dates mentioned in this petition was and now is a corporation incorporated under the laws of the State of Pennsylvania, and a common carrier engaged in interstate commerce by transportation or passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of

origin in Pennsylvania to points outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said City and in which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III.

During the period from April 1, 1904, to October 18, 1905, petitioners were lessees of a tract of bituminous coal land situated in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Falcon No. 2, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone & Clearfield Railway, one of the main branches of defendant's line and operated by defendant as its Tyrone Division, and, during said period, petitioners were continuously engaged in mining coal at said mine and selling it to points outside of the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Falcon No. 2 mine was four hundred and fifty (450) gross tons of coal per working day, which quantity petitioners were always able and prepared during said period to mine, ship and sell, had they been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish plaintiffs with sufficient cars to transport their coal, as aforesaid, nor did it furnish to petitioners their proper pro rata of the cars upon defendant's line but in its distribution of railroad cars to mines along its line, the defendant unjustly discriminated against petitioners' mine, Falcon No. 2, and gave undue and unreasonable preference and advantage to mines operated by the Berwind-White Coal Mining Company and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Di-

vision, in close proximity to Falcon No. 2, and having, in common with it, their sole outlet to market by way of defendant's lines, whereby defendant violated its duty as a common carrier and petitioners were put to great and unjust disadvantage and were unable to ship coal to market which they were able to mine, and for the sale of which they had orders for delivery to points outside the State of Pennsylvania, and because of defendant's refusal to adequately supply petitioners' need for cars, and because of such unjust discrimination against petitioners in the daily car distribution of cars upon defendant's line, and in particular upon the Tyrone Division, petitioners were damaged and suffered loss as producers, shippers and sellers of coal in the interstate coal trade and were deprived of profits which they would otherwise have made upon coal which they were unable to ship and sell, and for which they were unable to accept contracts, though such contracts were available, by reason of defendant's undue and wrongful discrimination and refusal to properly supply them with cars as aforesaid.

IV.

The mines owned, operated and controlled by the Berwind-White Coal Mining Company, and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone & Clearfield Railway, on the Tyrone Division of said respondent in close proximity to the Falcon No. 2 mine, owned by petitioners, and have a common outlet with petitioners' said mine to reach the markets for bituminous coal, either within or without the State of Pennsylvania, over the lines of the defendant company and there are no circumstances or conditions of carriage as against petitioners' mine, Falcon No. 2 aforesaid.

Between April 1, 1904, and October 18, 1905, petitioners made daily requests and gave daily orders for coal cars to be delivered to their said mine to be loaded with coal for

transportation to points and places beyond the State of Pennsylvania, but were denied and refused cars and were unduly and unreasonably discriminated against by respondent in the distribution of coal cars, whereby petitioners were at different times and for varying periods of time compelled to close their operation and hold their mine idle, whereby its miners and laborers removed and its organization and plant became demoralized and disorganized, and whereby petitioners were prevented from filling valuable contracts or from accepting and securing other valuable contracts, to their great damage as herein set forth.

During the periods from April 1, 1904, to April 1, 1905, and from April 1, 1905, to October 15, 1905, defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division, not less than 63,284 "assigned" (arbitrary) cars, which said cars were assigned as "private", "commercial" and "company fuel" cars, and were not charged against the *pro rata* share of said favored mines in making up the distribution sheets for said division and did not enter into the distribution of the coal cars among the mines in the said Division, whereby said favored companies were given the cars aforesaid over and above and in addition to their fair *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same periods petitioners' mine, Falcon No. 2, received only a few arbitrary cars, and these were charged against said mine's distributive share in the ratings for the division.

During the same periods respondent unduly and unjustly discriminated against the Clearfield Division in which petitioners' said mine was located by the arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said divisions, over and above the proper proportion to which said divisions were properly entitled, to

the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioners' mine, Falcon No. 2.

V.

The petitioners, in June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of defendant to the prejudice of petitioners and in violation of the Act to Regulate Commerce, approved February 4th, 1887, and Acts amendatory and supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainants therein reparation in damages to such an amount as it might be ascertained that said complainants had thereby suffered. Defendant, being duly served with a copy of said Complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties, thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1139, Opinion No. 1384, dated March 7, 1910, a copy of which finding with the conclusions and orders of the Commission is hereto attached and marked Exhibit B, and made a part of this petition.

VI.

After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of fact and of law on the part of complainants and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission on March 11th, 1912, ordering the defendant to make reparation to petitioners as in paragraph one of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1139, dated

March 11, 1912, a certified copy whereof is hereto attached, marked Exhibit A, and made a part of this petition.

VII.

Petitioners aver that a true copy of the aforesaid order of the Interstate Commerce Commission dated March 11, 1912, Opinion No. 1833, Docket No. 1139, was duly served upon defendant in the above entitled cause, and demand made that defendant pay petitioners the sum claimed in this petition, and as set forth in the aforesaid Order of the Commission, dated March 11, 1912, Exhibit C, hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum or any part thereof has been paid by defendant or any one on its behalf to petitioners or any one in their behalf. Wherefore petitioners have instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof or supplemental thereto.

Wherefore the said W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Co., as aforesaid, respectfully pray:

First.—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second.—That your Honorable Court will, by its order, fix a time and place for a trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

Third.—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth.—That your Honorable Court will enter judgment in favor of petitioners and against the said defendant, the Pennsylvania Railroad Company, for the sum of Twenty-seven thousand, three hundred and thirty-two dollars and fifty-five cents ($27,332.55) as hereinbefore set forth, with legal interest thereon from June 1st, 1912, and costs including a reasonable attorney's fee.

Fifth.—That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioners, as in duty bound, will ever pray, etc.

WM. A. GLASGOW, JR.,
Counsel for Petitioners.
1018 Real Estate Trust Building,
Philadelphia, Pa.

STATE OF PENNSYLVANIA, } ss.
COUNTY OF PHILADELPHIA. }

W. F. Jacoby, being duly sworn, deposes and says that he is one of the petitioners in the above entitled cause, and that the facts set forth in the foregoing petition are true and correct, to the best of his knowledge, information and belief.

W. J. JACOBY.

Sworn and subscribed to before me this eighteenth day of July, A. D. 1912.

JOHN H. HALL,
Notary Public.

(SEAL.)

My commission expires Jan. 16th, 1915.

"EXHIBIT A."

Opinion No. 1833.

INTERSTATE COMMERCE COMMISSION.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

Submitted April 20, 1911. Decided March 11, 1912.

Reparation awarded for damages resulting from discriminations practiced by the defendant in the distribution of coal cars.

David L. Krebs, Harry White, and *A. M. Liveright* for

Hillsdale Coal & Coke Company and Clark Brothers Coal Mining Company.

William A. Glasgow, Jr., and *John H. Hall* for W. F. Jacoby & Company.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson and *James H. Gleason* for Bulah Coal Company.

George V. Massey, Francis I. Gowen and *Murray & O'Loughlin* for defendant.

SUPPLEMENTAL REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

In Joynes v. P. R. R. Co., 17 I. C. C. 361, it was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money demands of that nature, arising out of discriminations ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts and that our jurisdiction extends to what is there referred to as rate damages as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our conclusions in Joynes v. P. R. R. Co., *supra*, had been announced, the Circuit Court of the

United States for the Eastern District of Pennsylvania, in Morrisdale Coal Co. v. P. R. R. Co., 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff but also to ascertain and enter judgment for the damages so sustained. The Court held that this Commission alone could entertain a complaint of that nature. See also Morrisdale Coal Co. v. P. R. R. Co., 183 Fed. 929.

It will be seen therefore that with respect to the principle announced in Joynes v. P. R. R. Co., *supra*, there is a conflict of view as between the Commission and the very court to which these complainants, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof.

The history of the complaints, the issues raised by the pleadings, and our course in dealing with them, are fully explained in our previous reports herein. Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C., 356; Jacoby & Co. v. P. R. R. Co., 19 I. C. C., 392; and Bulah Coal Co. v. P. R. R. Co., 20 I. C. C., 52. And therefore, in proceeding for the reasons explained to exercise jurisdiction to award

damages, no statement of the facts need be made. It will suffice to refer to our reports in the cases cited. The record has now been carefully studied with a view to arriving at the amount of damages which each of the complainants is shown to have sustained, and we shall briefly announce our conclusions:

Claim of the Hillsdale Company.

We find that as a result of the discriminatory acts of the defendant the Hillsdale Coal & Coke Company was damaged in the sum of $27,193.01, which it is entitled to recover, with interest from May 9, 1907.

The original claim was for $127,855.65, which upon re-argument was restated at $108,207.05, based on the assumption of a full car supply. A more conservative claim of $65,434.87 was also made in the brief on re-argument, based on an assumed output of 600 tons per day and what is claimed would have been a fair distribution of cars to this division of the defendant's lines and a fair share to these mines. Giving full weight to all that we find of record, however, we have been unable to find any clear basis for awarding this sum. Nor is there sufficient proof to enable us in this claim to make any finding with respect to the damages alleged to have been sustained by reason of the excess cost of mining the coal actually shipped to interstate destinations resulting from the irregular and inefficient working of the mine due to the failure of the defendant to furnish a regular and adequate supply of cars.

In arriving at our conclusion we have divided the time into two periods, the first from October 1, 1903, to March 31, 1906, after which the mines in this district were closed down for several months as the result of a strike; and the second from August 1, 1906, to May 1, 1907. We find the following facts established by the complainant's proof, and have used them as factors in calculating the damages:

(*a*) That the complainant's mines, known as Hillsdale

Nos. 2 and 3, during each of the two periods could have produced and disposed of an average of 500 tons of coal per working day; and that 22 working days would have been an average working month.

(*b*) That if the complainant had received its proper proportion of the cars available for distribution by the defendant it could have shipped and disposed of 143,880 tons during the first period and 67,795.20 during the second period; that it actually shipped during the two periods 45,059.84 tons and 35,719.25 tons, respectively, making a shortage in its output of 98,820.16 tons during the first period and 32,075.95 during the latter period; that of this tonnage 87,831.36 tons would have moved to points without the State of Pennsylvania during the earlier period and 15,662.68 during the latter period. In other words, we find that the quantity of coal which the complainant was prevented from selling and shipping to interstate destinations as the result of the discrimination against it in the matter of car supply was 87,831.36 tons and 15,662.68 tons for the periods named.

(*c*) That the average selling price for the coal at the mine for interstate markets would have been $1.0711 per ton during the first period and $1.1320 during the second period; that the cost of production during the same periods with its proper proportion of cars would have been 81 cents and 86 cents per ton, respectively; and that the profit lost on the shipments and sales which the complainant was prevented by the discriminatory acts in question from making during the first period was 26.11 cents per ton and during the second period 27.2 cents.

We have attached no importance to the fact, but for a better understanding of the situation it may be well to state, that this complainant has recovered of the defendant a judgment in the sum of $17,500 in an action in the State courts similar to this proceeding, but relating only to intrastate traffic. Hillsdale Coal & Coke Co. v. P. R. R. Co., 229 Pa., 61; 78 Atl., 28.

CLAIM OF JACOBY & COMPANY.

We find that by reason of the discriminations ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 I. C. C., 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

(*a*) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(*b*) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

(*c*) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(*d*) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

(*e*) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049

per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of $7,500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded.

Claim of Clark Brothers Company.

The discrimination practiced by the defendant against Clark Brothers Coal Mining Company is set forth in Jacoby v. P. R. R. Co., 19 I. C. C., 392. We now find that the damages sustained by this claimant as the result thereof amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.

The amount of its claim as stated in the original petition was $36,401.12. Our findings of fact, on which we arrive at this conclusion, are as follows:

(*a*) That the mines known as Falcon Nos. 2, 3, and 4 had an average output capacity of 600 tons, 120 tons, and 275 tons per working day, respectively, for the period of the action; and that 20 working days would have been an average working month.

(*b*) That dividing the time in question into two periods, one prior to March 31, 1906, and the other from August 1, 1906, to May 1, 1907, as we have done in the Hillsdale case, *supra*, the complainant could have disposed of and shipped 38,537.40 tons from Falcon No. 2 during the first period and 74,498.40 tons during the second period; that it actually shipped from that mine 11,812.76 tons and

21,326.18 tons in the respective periods, making a shortage in the output of 26,724.64 tons during the first period and 53,172.22 tons during the second period; and that of this tonnage it would have shipped and sold at interstate destinations 19,086.73 tons during the first period, and 35,109.61 tons during the second period.

(*c*) That from Falcon No. 3 the complainant could have shipped and sold 7,707.48 tons during the first period and 14,899.68 during the second period, if it had received its proper share of equipment; that it actually shipped from this mine during those periods 1,184.66 tons and 3,018.90 tons, respectively, making its output 6,522.82 tons during the first period and 11,880.78 during the second period less than it would have been with the proper car supply; and that of the figures last mentioned it would have shipped to points without the State of Pennsylvania 3,866.72 tons and 6,423.93 tons in the respective periods.

(*d*) That with its proper proportion of cars the mine known as Falcon No. 4 could have produced, sold, and shipped during the first period 12,210 tons and during the second period 34,145.10 tons, whereas it actually was able to ship but 2,306.12 tons and 11,105.45 tons; that it therefore shipped 9,903.88 tons during the first period and during the second period 23,039.65 tons less than it would have sold and shipped with its proper proportion of the cars; and that of this shortage 9,184.85 tons represents what would have been interstate business during the first period, and 8,497.02 tons during the second period.

(*e*) That the average selling price of the coal mined at Falcon No. 2 during the first period was $1.289 per ton and during the second period $1.25 per ton; that the cost of production at that mine, based on a fair car supply, would have been 92 cents per ton and 96 cents per ton during the respective periods; that the average selling price of the coal from Falcon No. 3 was $1.20 during both periods

and the cost of production 92 cents and 96 cents during the two periods; that the average selling price at Falcon No. 4 was $1.07 per ton during the first period and $1.132 per ton during the second period, and that the cost of production at that mine was 82 cents per ton and 86 cents per ton during the respective periods. The profit that would have accrued on the output of the respective mines was therefore as follows: Falcon No. 2, 36.9 cents and 29 cents; Falcon No. 3, 28 cents and 24 cents; and Falcon No. 4, 25 cents and 27.2 cents per ton. This measures the loss on the tonnage which the complainants were unable to ship.

(*f*) That the actual cost of production is shown by the record as $1.1419 per ton during the first period and $1.2063 per ton during the second period at Falcon No. 2; that the actual cost at Falcon No. 3 was $1.166 per ton during the first period and $1.311 per ton during the second period; that the actual cost at Falcon No. 4 was $1.017 and 90 cents during the respective periods; and that the excess over the cost of production, as shown in the preceding paragraph herein, resulting from the irregular car supply, was 22.19 and 24.63 cents per ton, respectively, at Falcon No. 2; 24.6 and 35.1 at Falcon No. 3; and 19.7 and 4 cents for the respective periods at Falcon No. 4. This is the measure we have used in arriving at the loss sustained by these complainants in increased cost of producing the coal actually sold and shipped to interstate points during the period in question.

Claim of Bulah Coal Company.

Following our conclusion in Bulah Coal Co. v. P. R. R. Co., 20 I. C. C., 52, that the defendant had unlawfully discriminated against these complainants, we now assess the damages resulting therefrom at $50,307.05, with interest from June 28, 1907.

The reparation prayed for by the complainants aggre-

gates $155,401.59. In our previous report wo took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new copartnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

(*a*) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(*b*) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(*c*) That if the complainants had received their proper proportion of the cars available for distribution they could have mined, sold and shipped 120,415.68 tons during the first period and 214,257.12 tons during the second period; that they actually shipped during the two periods 110,892 and 143,000 tons respectively, making a shortage in their output of 9,523.68 tons in the first period and 71,257.12 tons for the second period; and that of this tonnage 3,878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold at interstate destinations.

(*d*) That the average profit on orders received by the complainants for points without the State of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants' loss on the coal which they were unable to ship during the period of the action, and the damages allowed on this ground aggregate $15,016.60.

(e) That the cost of production at the complainants' mines during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a non-discriminatory share of the car supply had been received; and that the excess in the actual cost of production of the coal mined and shipped to interstate destination resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the State of Pennsylvania during the period of the action; and the damages awarded on that ground aggregates $35,290.45.

In cases of this kind there is a natural tendency on one side to enlarge and on the other to minimize the claim made. This is characteristic of the record before us. Damages are claimed by the petitioners to an extent not supported by the evidence adduced; on the other hand, the defendant has not sought so much to help the Commission to arrive at a correct award as to show the fallacious character of the factors adapted by the complainants in arriving at their estimates of their damages. The result is a record that is not so helpful as it might be. The responsibility for this, however, rests with the parties; in such a case we can accept only the responsibility that follows upon a careful study of the record and an earnest effort to weigh all the evidence before us and to reach such conclusions as it fairly justifies.

Many theories as to the elements that should be considered in estimating damages in a case of this kind were advanced by each side. It is said by the complainants that their damages should be estimated on the basis of a supply of coal cars according to the physical capacity of their mines, or at

least on the basis of their rated capacity. We have dealt with the claims only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation. According to the argument and brief on behalf of the defendant there is no sound theory upon which the damages of the complainants may be calculated. The defendant contends in all these cases that the coal which the complainants were unable to mine because of their failure to obtain their fair share of cars still remained in the ground, and that the extent of the damage really suffered can not therefore be ascertained without proof, showing that the coal when subsequently mined was sold at a less profit than might have been realized during the period of the action. We are not prepared to enter upon a discussion of that question. Such claims are clearly justifiable, and we know of no better guide or basis for our action than the rule followed by the courts in similar cases. In the action by the Hillsdale Coal & Coke Company in the State courts, to which reference has heretofore been made, the Supreme Court of Pensylvania, in 229 Pa. 261; 78 Atl., 28, said

> As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine. * * * Counsel for appellant argued that because, as a result of the defendant's discrimination, the coal of the plaintiff was left in the ground, and might be available for future shipment, and as there was no evidence that prices which pervailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there

was no room for the inference that the plaintiff would realize for his coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose.

We do not undertake to say whether this is a correct rule, but simply refer to the case in explanation of our findings.

Orders will be entered in accordance with these conclusions.

SUPPLEMENTAL ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D. 1912.

No. 1063.

HILLSDALE COAL & COKE COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19, I. C. C., 356, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, Hillsdale Coal & Coke Company, on or before the 1st day of

June, 1912, the sum of $27,193.01, with interest thereon at the rate of 6 per cent. per annum from May 9, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY
v.
THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of $31,127.96, with interest thereon at the rate of 6 per cent. per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,
v.
THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date

hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $31,715.57, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

By the Commission.

JOHN H. MARBLE,
Secretary.

(Seal)

"EXHIBIT B."

Opinion No. 1384.

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,
v.
PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY
v.
SAME.

Decided March 7, 1910.

REPORT OF THE COMMISSION.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

Submitted January 30, 1909. Decided March 7, 1910.

1. The special allotment daily of 500 of its system coal cars to a particular operator for the purpose of supplying foreign steamships with coal found to be a discriminatory practice so long as they were not counted against the rating of those mines during periods of car shortage. A like view expressed of the sale by the defendant of 1,000 of its coal cars to the same operator.

2. Following Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, p. 356, defendant's rules and regulations for the distribution of coal cars during periods of car shortage found to be unlawful.

Harry Boulton, John H. Minds, William A. Glasgow Jr., and John William Hallahan, 3rd, for W. F. Jacoby & Company.

David L. Krebs for Clark Brothers Coal Mining Company.

Francis I. Gowen and *George V. Massey* for defendant.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

The mines of the complainant in Hillsdale Coal & Coke Co. v. P. R. R. Co., just disposed of (ante, p. 356), are located near the town of Glen Campbell, in Indiana County, in the State of Pennsylvania, on the Cush Creek branch of that part of the defendant's Cambria and Clearfield Division which extends northward from Cresson; and the chief competitor of that complainant has been D. E. Williams & Company, whose mines are in that district. In the above-entitled complaints the mines are in another mining district in the bituminous coal regions of Pennsylvania and on another part of the Cambria and Clearfield division of the defendant. They are located about nine miles west of Osceola Mills, in or near the town of Smoke Run, in Clearfield County, on what is known as the defendant's Moshannon branch, which, at Osceola Mills, joins its so-called Tyrone division extending northward from its junction with the main line at Tyrone. Since October, 1905, the Clark Brothers Coal & Mining Company has operated, under leases, three mines known as Falcon No. 2, No. 3, and No. 4. The largest and best equipped of these mines known, Falcon No. 2, was operated prior to that time by the petitioner, W. F. Jacoby & Company, which had taken over the lease of the mine in April, 1904.

It is Falcon No. 2, and the period from April, 1904, to October, 1905, that are involved in the first of the above-entitled complaints. That mine is said to be one of the best equipped collieries in the district, and on April 1, 1904, had an inventory valuation of $30,000. It is provided with an underground electric system for hauling its mine cars and with a first class wooden tipple and a patent dump; it is also well supplied with mine cars and has ample switch-track facilities; and its grades favor the out movement of loaded mine cars. There are said to be from 175 to 200 acres of

solid coal in the three Falcon mines, varying in thickness from 2½ to 5 feet; and in No. 2 mine there were, in 1904, about 100 acres of coal remaining, some 30 acres having been mined prior to that time. The coal is accepted as a superior grade of steaming coal that is readily marketed in New England, New Jersey, New York and Pennsylvania, being shipped all rail over the defendant's lines of those points and also to tidewater.

It is not contended that there was any unfairness in the rating assigned to Falcon No. 2 during the period from April, 1904, to October, 1905, when it was being operated by the complainant, W. F. Jacoby & Company. The rating then given to it was 450 tons a day, and this the complainant in that case admits was a close approximation of its actual output capacity. It appears, however, that from October, 1905, to May, 1907, when Falcon No. 2 was being operated by the Clark Brothers Coal & Mining Company the rated capacity credited to the three Falcon mines was 9 cars or 315 tons for No. 2, 1 car or 35 net tons for No. 3, and 2 cars or 70 net tons for No. 4, making a total capacity of 12 cars or 420 tons for the three mines. In April, 1907, these ratings were increased to 13 cars or 455 tons for Falcon No. 2, 2 cars or 70 tons for Falcon No. 3, and 5 cars or 175 tons for Falcon No. 4, making an aggregate capacity assigned to the three mines of 20 cars or 700 tons daily. The complainant in the second of these complaints, in support of the theory, advanced also in the Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, that commercial capacity ought to be eliminated, calls attention to the fact that the defendant in its answer admits that during the period in question the actual physical capacity of the three Falcon mines was 709 tons, 144 tons, and 270 tons, respectively, or a total of 1,133 tons in all, which would require 31.1 cars daily to move. On the other hand it is to be noted that the petitioner in the second complaint contends that the physical capacity of

the three mines was only 600 tons, 125 tons, and 300 tons, respectively, or 1,025 tons in the aggregate per day. Finally it must be observed that neither of the petitioners made complaint to the defendant, at that time, of the ratings of these mines, and when finally they did complain the defendant accepted their engineer's statement or estimate as to their actual working capacity. Under these circumstances, we see no substantial basis for any finding of discrimination against the complainants with respect to the defendant's ratings of their mines.

The damages sought to be recovered in the first of these complaints amount to $51,950.49 and in the second complaint to $36,901.13. Falcon No. 2 was purchased from the Penn Collieries Company, in which W. F. Jacoby seems to have been interested. The transaction appears of record as a purchase, but it may have been a mere change of ownership on the basis of nominal values. Nevertheless, the record shows a purchase price of $25,000 and that W. F. Jacoby & Company retained the mine until October, 1905, when they sold it for $32,500, or for $7,500 more than they paid for it. In the meantime they had mined 55,000 tons of coal and sold it apparently at a profit of about 30 cents a ton. Whether the mine could have been sold so well if more coal had been taken out of it by the complainant is a question as to which it is difficult to arrive at any satisfactory conclusion. It is to be noted, however, that the complainant claims to have had actual orders for a substantial portion of the output capacity of Falcon No. 2.

As we understand these cases, the substantial points upon which discrimination may be predicated are as follows:

There are a number of mines on the Moshannon branch of the defendant that are owned by other operators, but in this connection it will suffice to mention only the six mines operated by or for the Berwind-White Coal Mining Com-

pany, one of which, known as Eureka No. 27, immediately adjoins the complainant's Falcon No. 2. The same "D" coal vein is worked in these two mines. The quality of the coal is therefore the same and it is claimed that the capacities of the two mines were substantially the same at the period involved in the first of these two complaints. Falcon No. 2 is said in fact to have been better equipped, and if this was the case it would seem to have had an advantage over its neighbor if it had been placed on an equal footing in the matter of car supply.

But neither Falcon No. 2 nor the mines of the complainant, the Clark Brothers Coal & Mining Company, was placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal-car equipment during the period of the actions.

During the years 1902, 1903 and 1904 the employes of the defendant that were in charge of the distribution of coal-car equipment had special orders for giving to the Berwind-White Coal Mining Company a special allotment of 500 cars daily. That company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because of a lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the coal and oil investigation. Few, if any, of these specially assigned cars reached the Berwind-White mines in this particular mining district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in another district; nevertheless, it was inequitable in principle and undoubtedly so to some extent at least in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must

be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district.

Another point also mentioned in our report in the coal and oil investigation just referred to is that 1,000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind-White Company. The defendant to that extent diminished its capacity to supply the coal-car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors.

It is established with reasonable clearness on the record that the Berwind-White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars in large numbers and were therefore kept in operation almost continuously while the complainants received an inadequate supply and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind-White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connection with coal. Under the rules of defendant, fully explained in Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, the ownership of such private cars and the enjoyment of these contracts resulted in the special allotment to the mines of that company of these so-called assigned cars. For the reasons explained at some length in that case those rules operated as an undue discrimination against these complainants, and we so find. But for the present and for

the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby.

An order will be entered in accordance with these conclusions.

ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of March, A. D. 1910.

Present:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
} *Commissioners.*

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

These cases being at issue upon complaints and answers

on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the third section of the Act to Regulate Commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required, on or before the 1st day of November, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

ORDER OF COURT.
Filed July 19, 1912.

Before McPherson, *J.*

AND NOW, July 19th, 1912, the petition of W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY & COMPANY, in the above proceeding having been filed and the averments thereof considered, it is ordered that the PENNSYLVANIA RAILROAD COMPANY be and are hereby directed and ruled to file a plea, answer or demurrer to said petition within thirty days of the service of a copy of said petition together with a copy of this Order, or judgment sec leg.

BY THE COURT,
Attest: Henry B. Robb,
Deputy Clerk.

DEMURRER OF DEFENDANT TO PETITION OF THE PETITIONERS.
Filed Sept 18, 1912.

The Pennsylvania Railroad Company, the defendant in the above entitled action, by protestation, not confessing or acknowledging all or any of the matters or things in the said petition contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said petition, and for causes of demurrer shows:

1. That it appears from the petition itself that the petitioners are not entitled to maintain the action.

2. That it appears from the petition that the action or proceeding has been brought to recover the amount of a certain award made in favor of the petitioners and against

the defendant by the Interstate Commerce Commission, which said award the said Commission was without authority to make, because the authority conferred by the Acts of Congress creating the said Commission and defining its powers and jurisdiction does not extend to nor include the making of awards of the character of that which forms the basis of the present action, nor has the said Commission been empowered by said Acts of Congress to entertain claims for damages of the character asserted by the petitioners in the proceeding instituted by them before the Commission which eventuated in the making of the said award.

Wherefore, and for divers other good causes of demurrer appearing on the said petition, this defendant doth demur thereto. And it prays the judgment of this Honorable Court, whether it shall be compelled to make any answer to the said petition; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN G. JOHNSON,
Solicitor and Counsel for Defendant, The Pennsylvania Railroad Company.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

JOHN G. JOHNSON,
Of Counsel for Defendant, The Pennsylvania Railroad Company.

Philadelphia, September 18, 1912.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA. } *ss.*

Lewis Neilson, being duly sworn, depdoses and says: I am Secretary of the Pennsylvania Railroad Company, the

above named defendant. The foregoing demurrer is not interposed for delay.

LEWIS NEILSON.

Sworn to before me this 18th day of September, 1912.

HENRY E. CAIN,
(SEAL) *Notary Public.*

Commission expires February 21, 1915.

OPINION.

Filed Nov. 12, 1912.

SUR DEMURRER TO PLAINTIFF'S PETITION.

THOMPSON, *J.*

This suit was brought to recover damages from the Pennsylvania Railroad Company which the plaintiffs claim to have suffered by reason of unjust and unlawful discrimination against the plaintiffs practiced by the defendant in violation of the Act to Regulate Commerce in the distribution of coal cars in the Clearfield coal region of Pennsylvania, in which the coal mines owned and operated by the plaintiffs were situated.

The petition sets out the facts upon which the plaintiffs' claim of unlawful discrimination is based. It further sets out that in June, 1907, the plaintiffs filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of the defendant in violation of the Act to Regulate Commerce, and praying for a hearing and an order awarding the plaintiffs reparation in damages. It recites that, after answer and joinder of issue, the cause was heard and argued by all the parties and that a report was duly filed in which the Interstate Commerce Commission found that the rules, reg-

ulations and practices of the defendant of which the plaintiffs complained unduly discriminated against them, and that the Commission thereupon on March 11, 1912, made an order of reparation against the defendant in the sum of Twenty-one thousand, ninety-four dollars and thirty-nine cents ($21,094.39), with interest at the rate of six per cent. per annum from June 28, 1907. The suit is brought to recover the principal and interest awarded amounting to Twenty-seven thousand, three hundred and thirty-two dollars and fifty-five cents ($27,332.55), with interest from June 1, 1912, "as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission dated March 11th, 1912".

The defendant demurs upon the ground that the action is brought to recover the amount of an award which the Commission was without authority to make, because the authority conferred by the Acts of Congress does not extend to nor include the making of awards of the character of that which forms the basis of the action and because the Commission has not been empowered to entertain claims for damages of the character asserted by the plaintiffs in the proceeding instituted by them before the Commission.

In the case of Morrisdale Coal Co. v. Pennsylvania Railroad Co., 176 Fed. Rep. 748, where a suit was brought in this district to recover damages for alleged unlawful discrimination in distribution of coal cars in violation of the Interstate Commerce Act, the plaintiff had not prior to bringing suit filed a complaint with the Interstate Commerce Commission and obtained a ruling of the Commission finding the alleged discriminatory practice unlawful nor obtained an order from the Commission for reparation. There was a trial by jury and a return of a special verdict. The defendant moved to dismiss the suit upon the ground that the Circuit Court was without primary jurisdiction to entertain the action. The

question was whether, in a suit to recover damages for an alleged unlawful discrimination in which the question of rates was not involved, a previous application to the Interstate Commerce Commission for relief under Section 13 of the Act to Regulate Commerce was a prerequisite to maintaining an action in court, the Supreme Court having held in the case of Texas and Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S. 426, that a shipper seeking reparation predicated upon the unreasonableness of an established rate must primarily invoke redress through the Interstate Commerce Commission, which body alone it was declared is vested with power originally to entertain proceedings for the alteration of an established schedule. The motion to dismiss for want of jurisdiction was granted by Judge McPherson under the authority of the decisions of the Supreme Court in the cases of Texas and Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S. 426; Baltimore & Ohio Railroad Company v. United States ex rel. Pitcairn Coal Company, 215 U. S. 481; Interstate Commerce Commission v. Illinois Central Railroad Company, 215 U. S. 452.

The judgment of the Circuit Court was affirmed by the Circuit Court of Appeals, Morrisdale Coal Co. v. Pennsylvania Railroad Co., 183 Fed. 929.

In the case at bar it is conceded by the defendant that, in order to maintain the present action, it was necessary for the plaintiffs to first complain to the Interstate Commerce Commission and obtain a ruling of that body upon the lawfulness or unlawfulness of the alleged discriminatory practice, but it is contended that the Commission, having passed upon the practice, exhausted its authority and under the Act had no power to make an award of damages in a case like this where the order of reparation involves a finding which is not the result of a mere calculation as is the case in a cause of action arising from alleged discrimination in rates. It was

argued by counsel for the defendant that in the Morrisdale case the question of the Commission's primary jurisdiction to make an award of reparation was not decided by Judge McPherson. The position of the defendant is thus stated in counsel's brief:

> "It will be manifest, however, from a reading of the whole opinion that Judge McPherson considered solely the question of the right of the Courts to entertain actions for damages in the absence of the Commission's primary consideration and condemnation of the carrier's regulations, and that the question whether the Commission's primary jurisdiction extended beyond the consideration of the questions which were involved in reaching a decision as to whether or not the carrier's regulations were discriminatory was really not considered nor passed upon by him at all. True it is that he did speak of this jurisdiction. He did say that in his opinion the Commission 'has the primary jurisdiction to award reparation', but it is clear that he was speaking of the jurisdiction of the Commission generally to entertain complaints of the character which was involved in the action pending before him, and had not in mind the question whether the Commission's jurisdiction was confined to the administrative features of the Interstate Commerce Act or went further and included the performance of the judicial functions involved in considering and passing upon claims for damages of the character which the Morrisdale Coal Company was endeavoring to recover."

The Circuit Court of Appeals in its decision refrained from determining the question of the jurisdiction of the Commission to award damages because that question was not raised in the briefs nor in the record and was not necessary for the determination of the case after the one jurisdictional question,

that of the necessity of the Commission passing upon the discriminatory nature of the practice of the carrier, was determined. Judge Lanning said, however, in his opinion:

> "As already suggested, the letter of the statute seems to confer upon the Commission the power to assess damages in every case of discriminatory practices. Its procedure in making the assessment constitutes no part of a judicial proceeding. In a court of law its finding and order are but *prima facie* evidence of the damages sustained."

and Judge McPherson in his opinion in the Circuit Court said:

> "In a word, and without repeating the language of the Supreme Court that seems to me to justify the conclusion, I hold that the Commission has the primary jurisdiction to award reparation for such damages as may have been caused by a preferential practice in distributing coal cars in case of shortage; and that the circuit court has not the primary power to award such damages, even although they may have been caused by a practice that did not prevail at the time when the suit was brought."

The case at bar was one of a group of cases considered together by the Interstate Commerce Commission of which the case of Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company, 19 I. C. C. Rep. 356, was one. The action of the Commission in that case is referred to in Judge Lanning's opinion in the Circuit Court of Appeals in the Morrisdale Coal Company case in the following language:

> "It has therefore been held by a majority of the Commission in Hillsdale Coal & Coke Co. v. Pennsylvania R. R. Co., decided March 7, 1910,

that it has no authority or power to assess and determine the measure of damages in such a case as the one now before us. The view of the majority of the commission was that the only damages it may assess are rate damages, or damages that can be measured by the difference in the rate actually charged and the rate which, for any reason under the act, ought to be charged. The same view had been previously expressed by a majority of the commission in Joynes v. Pennsylvania R. R. Co., 17 Interst. Com. R. 361. 'As to whether we may go beyond the transportation question, the alleged discriminatory rules and practices', said the majority through Mr. Commissioner Harlan, 'and enter upon an inquiry as to the amount of the damage that may have been suffered by the complainant, the commission is divided, as in the case to which we have just alluded (the Joynes Case). The majority is still of the opinion that it is not for us under the law to assess and determine the measure of the damages thus sustained by the complainant; that being a judicial question for the courts.' Inasmuch, however, as the case now before this court had been decided by the Circuit Court before the Hillsdale Coal & Coke Company's Case was decided by the Commission, it concluded to hear argument on the question of damages to the end that, if the commission should award damages, the question of its power so to do might ultimately come before the courts for their consideration."

In the supplemental report of the Commission of March 11, 1912, which was subsequent to the decision of the Circuit Court of Appeals in the Morrisdale case, Commissioner Harlan stated the position of the Commission in the following language:

"In Joynes *v.* P. R. R. Co., 17 I. C. C., 361, it

was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money demands of that nature, arising out of discriminations ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts and that our jurisdiction extends to what is there referred to as rate damages as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our conclusions in *Joynes v. P. R. R. Co., supra*, had been announced, the Circuit Court of the United States for the Eastern District of Pennsylvania, in Morrisdale Coal Co. *v.* P. R. R. Co., 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff but also to ascertain and enter judgment

for the damages so sustained. The court held that this Commission alone could entertain a complaint of that nature. See also Morrisdale Coal Co. *v.* P. R. R. Co., 183 Fed., 929.

It will be seen therefore that with respect to the principle announced in Joynes *v.* P. R. R. Co., *supra*, there is a conflict of view as between the Commission and the very court to which these complainants, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof."

I find nowhere in the Act language creating a distinction in the power of the Commission to award damages between cases arising from unlawful rates and those arising from unlawful regulations or practices.

Section 8 imposes liability upon the common carrier for damages sustained by any person injured by any act of the carrier prohibited or declared to be unlawful in the Act.

By Section 9 of the Act it is provided that any person claiming to be damaged by any common carrier subject to the Act can either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of damages in a district or circuit court of the United States, "but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which

one of the two methods of procedure herein provided for he or they will adopt."

Section 13 gives the Commission jurisdiction upon complaints "of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof," and provides that the carrier shall be relieved of liability to the complainant if it shall make reparation for the injury alleged to have been done, and in case of a failure to satisfy the complaint, provides for investigation by the Commission.

In the case of an investigation, it is by Section 14 made the duty of the Commission to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises and in case damages are awarded such report shall include the findings of fact on which the award is made.

Under Section 15, the Commission, if it is of opinion that any rates or charges or any regulations or practices are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, is authorized to determine what will be the just and reasonable rates or charges and what regulation or practice is just, fair and reasonable, and to make orders that the carrier cease and desist from such violation to the extent to which the Commission finds the same to exist. The section further provides "All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, * * * as shall be prescribed in the order of the Commission."

Section 16 provides:

> "That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to

> the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

As held by the Supreme Court in the Abilene Cotton Oil Company case:—

> "Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission."

and in construing the effect of the 9th Section of the Act, Mr. Justice White in his opinion announced the following conclusion:

> "We think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of."

The Circuit Court of Appeals in the Morrisdale Coal Company case, in discussing the conclusions of the Supreme Court in the Abilene Oil Company case as to the effect of Sections 9 and 22 of the Act held

> "We conclude, therefore, that if, except for the act to regulate commerce, the Morrisdale Coal Company would have had a common-law right of action against the Pennsylvania Railroad Company for the damages here claimed, that right was not merely suspended while the old rule of distribution was in operation, but was taken away for all time and the coal company given a substituted right of procedure before the commission, at any time within one year after June 29, 1906, for a determination by the commission of the question whether the rule complained of was discriminatory, unless, indeed, the commission has no power, under the act, to determine whether a rule for the distribution of cars is discriminatory."

In Judge Lanning's opinion, after reviewing the decisions of the Supreme Court in the cases of the Texas & Pacific Ry. Co. v. Abilene Cotton Oil Company, the Baltimore & Ohio Railroad Co. v. Pitcairn Coal Company, and the Interstate Commerce Commission v. Illinois Central R. R. Co., it was held:

"These cases conclusively establish the doctrine that the Interstate Commerce Commission alone has original jurisdiction to determine whether an existing rate schedule, or an existing regulation or practice affecting rates, or an existing regulation or practice of any other kind affecting matters sought to be regulated by the act, is unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, and that the courts cannot, by mandamus, injunction, or otherwise, control or modify any order of the commission made by it in the due performance of its merely administrative functions. Of course, there may be cases involving constitutional or legal rights in which judicial questions for the determination of the courts may be presented. It is also the established doctrine that, where the subject-matter of the complaint is an alleged unreasonable or prejudicial rate charge, the commission has the power, after determining that the charge was excessive, to award damages to the complainant. In such case the award would probably be a mere matter of calculation, and would be a sum equal to the difference between the charge found to be reasonable and the charge actually made by the carrier. In a case where the alleged discriminatory rule has relation to the distribution of coal cars, it is obvious that, if the commission sustains the complaint and prescribes what shall thereafter be a reasonable rule of distribution, an award of damages to the complainant for injuries sustained under the operation of the discriminatory rule cannot be a mere matter of calculation."

After stating the position of the Interstate Commerce Commission, which is recited above, Judge Lanning continued:

"As already suggested, the letter of the statute seems to confer upon the commission the power to

it must be assumed that the procedure which was intended to apply to one class of cases was intended to apply to both. The argument on behalf of the defendant as against the power of the Commission to make an award of damages in cases arising from discriminatory regulations and practices, I think must be regarded as only an argument of inconvenience which assails the wisdom of the legislation or its efficiency, which are matters for Congress and not for this court to determine. This view of the matter is, I think, reinforced by the provision of Section 16 making the findings and order of the Commission, *prima facie* evidence of the facts therein stated. Under the decisions, the courts cannot by mandamus, injunction or otherwise control or modify any order of the Commission made by it in the due performance of its merely administrative functions. The sole question before the courts in passing upon the validity of an administrative order of the Interstate Commerce Commission is whether it had power to make the order and not the mere expediency or wisdom of having made it. This being the case, what purpose could Congress have had in providing that on the trial of a suit to recover an award by the Interstate Commerce Commission of damages, the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, if the findings and order are to relate solely to the question whether or not the regulations and practices complained of were discriminatory? If the findings and order as to that question alone are merely *prima facie* evidence of the facts therein stated then the carrier would be permitted to rebut the *prima facie* effect of the findings and order and to introduce evidence which had not been introduced before the Commission, which would result in a trial by a court and jury of the very questions as to which the Supreme Court has held that the findings and order of the Commission are final. The conclusion seems to be inevitable that in making the findings and order of the Commission *prima facie* evidence only, it was in-

tended by Congress that the findings and order should include what must ultimately be decided by a court and jury in case the carrier does not comply with the order for the payment of money, that is to say, the amount of the damages which the plaintiff has sustained. Congress having established a method of procedure and a rule of evidence governing actions under the statute, without indicating a different procedure to be followed in cases involving a discriminatory practice from that to be followed in cases involving unjust or unreasonable rates, I am of the opinion that the Interstate Commerce Commission had authority not only to pass upon the lawful or unlawful nature of the practice in this case, but also to make an order for reparation in damages, and that the present suit is properly based upon the award by the Interstate Commerce Commission.

The demurrer is therefore overruled.

STIPULATION.

Filed Aug. 17, 1912.

It is hereby stipulated and agreed between counsel for the parties in the above entitled cause that defendant may file its plea, answer or demurrer to the petition filed in the above cause at any time on or before September 18th, 1912, and that meanwhile the case shall be set down upon the trial list for the October Term of the District Court, subject to such plea as may be filed prior to or on September 18th, 1912, and without prejudice to defendant's right to answer or demur on or before, but not after said date.

WM. A. GLASGOW, JR.,
Attorney for Plaintiff.
JOHN G. JOHNSON,
Attorney pro Defendant.
per Carlyle H. Ross.

PLEA.

Filed Nov. 16, 1912.

Defendant in the above pleads "Not Guilty."

JOHN G. JOHNSON,
Attorney for said Defendant.

Nov. 16, 1912.

JURY.

And afterwards, to wit, on the third day of March, 1913, a jury being called comes to wit:

George H. Yeager	N. F. Hoffman
John K. Loughlin	R. A. Keely
Rupert Yerkes	Thomas P. Lowrey
Jacob W. Brennerman	Harry S. Schultz
C. P. Martindale	August Boitney
William M. Capp	Martin Graver

who are respectively sworn or affirmed to well and truly try the issue joined.

VERDICT.

And afterwards, to wit, on the 4th day of March, 1913, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages in the sum of Twenty-eight Thousand Five Hundred and Seventy-two and 54-100 ($28,572.54) Dollars.

BILL OF EXCEPTIONS.

Filed Apr. 8, 1913.

Be it remembered, that in the said term of June, 1912, came the said plaintiff into the said Court, and impleaded the said defendant in a certain plea of trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at the County aforesaid before the Honorable J. Whitaker Thompson, Judge of the said Court, the third day of March, 1913, the aforesaid issue between the said parties came to be tried by a jury of the said County for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue, being also called came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said defendant did except to the rulings of the Court as herein appears.

Before Hon. J. Whitaker Thompson, *J.*, and a Jury.

Philadelphia, Monday, March 3rd, 1913.

Present:

William A. Glasgow, Jr., Esq., and
John H. Hall, Esq., representing the plaintiffs.
John G. Johnson, Esq., and
Francis I. Gowen, Esq., representing the defendant.

Transcript of Testimony, Rulings of the Court, Charge of the Court, and Exceptions.

Jury sworn or affirmed March 3rd, 1913.

Mr. Glasgow opened the case to the jury on behalf of the plaintiffs.

Mr. Glasgow read the petition to the jury.

Mr. Gowen opened the case to the jury on behalf of the defendant.

PLAINTIFF'S EVIDENCE.

WILLIAM F. JACOBY, having been duly sworn, was examined and testified as follows:

By MR. GLASGOW:

Q. Who composes the firm or did compose the firm in 1904 and 1905 of W. F. Jacoby and Company?

A. Mr. I. C. Weber and myself.

Q. Was your firm engaged in mining coal at that time?

A. Yes, sir.

Q. Where?

A. At Smoke Run, Clearfield County, Pennsylvania.

Q. What is the name of your mine?

A. Falcon No. 2.

Q. Are you the same W. F. Jacoby and is Mr. Weber the same Isaac C. Weber, composing the firm of Jacoby and Company who made a complaint before the Interstate Commerce Commission?

A. Yes, sir.

Q. During the period from April 1st, 1904, to October 18th, 1905, covered by that complaint, will you tell the jury whether or not you made demand daily for cars for the ship-

ment of coal from the Falcon No. 2 mine?

A. We did.

Q. Daily demand?

A. Yes, sir.

Q. Did you receive the cars which you demanded for the shipment of your coal?

A. No, we did not.

Q. You say you are the same W. F. Jacoby that made the complaint before the Interstate Commerce Commission in the case of W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby and Company, against The Pennsylvania Railroad Company, No. 1139?

A. Yes, sir.

MR. GLASGOW: I offer in evidence the report of the Commission in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company against the Pennsylvania Railroad Company, No. 1139, decided March 7th, 1910, together with the order of the Commission in the same case entered on the 7th day of March, 1910.

MR. GOWEN: We object to offering any single part of the record. We are entirely willing to have the whole record go in.

MR. GLASGOW: What do you mean by "record"?

MR. GOWEN: The record and the testimony.

MR. GLASGOW: The Act to Regulate Commerce does not permit the offering of the whole record.

MR. GOWEN: We object to the admission of the report and the order in evidence, because it is but a part of the record in the case, and is not, therefore, admissible as the record before the Commission; and also because it embodies conclusions of law, arguments and other matters extraneous from, entirely disassociated from, findings of fact, and by the Inter-

state Commerce Act the findings of fact of the Commission are alone made *prima facie* evidence.

THE COURT: You say you object because it is not the record before the Commission. What do you mean by that—the evidence?

MR. GOWEN: Yes, sir. The whole record.

THE COURT: I will overrule the objection, and grant the defendant an exception.

(Exception noted for defendant, by direction of the Court.)

MR. GLASGOW: I will read the report of the Commission to the jury, in the case of W. F. Jacoby and Company against The Pennsylvania Railroad Company. Of course, I will ask your Honor in the charge to call the jury's attention to the fact that they are not to consider arguments or mere repetition of theories, but that the matter of fact found here is the discrimination.

Mr. Glasgow proceeded to read the report of the Commission, as follows:

"REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

The mines of the complainant in Hillsdale Coal & Coke Co. v. P. R. R. Co., just disposed of (ante p. 356), are located near the town of Glen Campbell, in Indiana County, in the State of Pennsylvania, on the Cush Creek branch of that part of the defendant's Cambria and Clearfield division which extends northward from Cresson; and the chief competitor of that complainant has been D. E. Williams & Company, whose mines are in that district."

MR. GOWEN: I object to that part being read, Mr. Glasgow knows that it is not proper to read that.

MR. GLASGOW: I do not know that an introductory statement in order to make what the Commission is going to find intelligible, is improper to read.

THE COURT: If that is the report in the case, of course you may read it.

MR. GLASGOW: Mr. Gowen objects to the first part, and I will leave out the first paragraph and read beginning with the second paragraph to the jury.

Mr. Glasgow read the report of the Commisison, beginning with the second paragraph, as follows:

"It is Falcon No. 2, and the period from April, 1904, to October, 1905, that are involved in the first of the above-entitled complaints. That mine is said to be one of the best equipped collieries in the district, and on April 1, 1904, had an inventory valuation of $30,000. It is provided with an underground electric system for hauling its mine cars and with a first class wooden tipple and a patent dump; it is also well supplied with mine cars and has ample switch-track facilities; and its grades favor the out movement of loaded mine cars. There are said to be from 175 to 200 acres of solid coal in the three Falcon mines, varying in thickness from 2½ to 5 feet; and in No. 2 mine there were, in 1904, about 100 acres of coal remaining, some 30 acres having been mined prior to that time. The coal is accepted as superior grade of steaming coal that is readily marketed in New England, New Jersey, New York and Pennsylvania, being shipped all rail over the defendant's lines to those points and also to tidewater.

It is not contended that there was any unfairness in the rating assigned to Falcon No. 2 during the period from April, 1904, to October, 1905, when it was being operated by the complainant W. F. Jacoby & Company. The rating then given to it was 450 tons a day, and this the com-

plainant in that case admits was a close approximation of its actual output capacity. It appears, however, that from October, 1905, to May 1907, when Falcon No. 2 was being operated by the Clark Brothers Coal & Mining Company the rated capacity credited to the three Falcon mines was 9 cars or 315 tons for No. 2, 1 car or 35 net tons for No. 3, and 2 cars or 70 net tons for No. 4, making a total capacity of 12 cars or 420 tons for the three mines. In April, 1907, these ratings were increased to 13 cars or 455 tons for Falcon No. 2, 2 cars or 70 tons for Falcon No. 3, and 5 cars or 175 tons for Falcon No. 4, making an aggregate capacity assigned to the three mines of 20 cars or 700 tons daily. The complainant in the second of these complaints, in support of the theory, advanced also in the Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, that commercial capacity ought to be eliminated, calls attention to the facts that the defendant in its answer admits that during the period in question the actual physical capacity of the three Falcon mines was 709 tons, 144 tons and 270 tons, respectively, or a total of 1,133 tons in all, which would require 31.1 cars daily to move. On the other hand it is to be noted that the petitioner in the second complaint contends that the physical capacity of the three mines was only 600 tons, 125 tons and 300 tons, respectively, or 1,025 tons in the aggregate per day. Finally it must be observed that neither of the petitioners made complaint to the defendant, at that time, of the ratings, of these mines, and when finally they did complain the defendant accepted their engineer's statement or estimate as to their actual working capacity. Under these circumstances, we see no substantial basis for any finding of discrimination against the complainants with respect to the defendant's ratings of their mines.

The damages sought to be recovered in the first of these complaints amount to $51,950.49 and in the second com-

plaint to $36,901.13. Falcon No. 2 was purchased from the Penn Collieries Company, in which W. F. Jacoby seemed to have been interested. The transaction appears of record as a purchase, but it may have been a mere change of ownership on the basis of nominal values. Nevertheless, the record shows a purchase price of $25,000 and that W. F. Jacoby & Company retained the mine until October, 1905, when they sold it for $32,500, or for $7,500 more than they paid for it. In the meantime they had mined 55,000 tons of coal and sold it apparently at a profit of about 30 cents a ton. Whether the mine could have been sold so well if more coal had been taken out of it by the complainant is a question as to which it is difficult to arrive at any satisfactory conclusion. It is to be noted however, that the complainant claims to have had actual orders for a substantial portion of the output capacity of Falcon No. 2.

As we understand these cases, the substantial points upon which discrimination may be predicated are as follows:

There are a number of mines on the Moshannon branch of the defendant that are owned by other operators, but in this connection it will suffice to mention only the six mines operated by or for the Berwind-White Coal Mining Co., one of which, known as Eureka No. 27, immediately adjoins the complainant's Falcon No. 2. The same "D" coal vein is worked in these two mines. The quality of the coal is therefore the same and it is claimed that the capacities of the two mines were substantially the same at the period involved in the first two of these complaints. Falcon No. 2 is said in fact to have been better equipped, and if this was the case it would seem to have had an advantage over its neighbor if it had been placed on an equal footing in the matter of car supply."

MR. GLASCOW: I will read the next paragraph this way.

Mr. Glascow continued reading the report of the Commission, changing the next succeeding paragraph to the one last read to read as follows:

"But Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal-car equipment during the period of this action.

During the years 1902, 1903, and 1904, the employes of the defendant that were in charge of the distribution of coal-car equipment had special orders for giving to the Berwind-White Coal Mining Company a special allotment of 500 cars daily. That company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because of a lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the coal and oil investigation. Few, if any, of these specially assigned cars reached the Berwind-White mines in this particular mining district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in another district; nevertheless it was inequitable in principle and undoubtedly so to some extent at least in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district.

Another point also mentioned in our report in the coal and oil investigation just referred to is that 1,000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind-White Company.

The defendant to that extent diminished its capacity to supply the coal-car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors.

It is established with reasonable clearness on the record that the Berwind-White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars, in large numbers, and were therefore kept in operation almost continuously while the complainants received an inadequate supply and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind-White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connection with coal. Under the rules of defendant, fully explained in Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, the ownership of such private cars and the enjoyment of these contracts resulted in the special allotment to the mines of that company of these so-called assigned cars. For the reasons explained at some length in that case those rules operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby.

An order will be entered in accordance with these conclusions."

MR. GLASGOW: The order is as follows, in the same case, and also referring to the case of Clark Brothers Coal Mining Company vs. Pennsylvania Railroad Company, No. 1111:

"These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its line for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as 'assigned cars,' from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation and practice of the defendant in that behalf unduly discriminated against the complainants and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required, on or before the 1st day November, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

MR. GLASGOW: I offer in evidence the supplemental report of the Commission in the case of W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, against the Pennsylvania Railroad Company, No. 1139, by Harlan, Commissioner, so much of the report as appears on pages 190 and 191, under the heading, "Claim of Jacoby & Company."

Mr. GOWEN: We object to the report relating to the claim of Jacoby & Company going in as a whole, upon the ground that it does not embody simply findings of fact.

THE COURT: I will admit the report insofar as it deals with Jacoby & Company, and grant the defendant an exception.

(Exception noted for defendant, by direction of the Court.)

Mr. Glasgow read the portion of the report referring to the claim of Jacoby & Company, as follows:

"We find that by reason of the discriminations ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 L. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

(a) That the fair rating of the mine for the time in question as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(d) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

(e) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of $7500 over the purchase price which they had paid. But we do not undertake to say whether or

not this amount or any part of it should be deducted from the amount of the reparation here awarded."

MR. GLASGOW: We offer in evidence the order entered by the Interstate Commerce Commission on March 11th, 1912, in the case of Jacoby & Company against the Pennsylvania Railroad Company, No. 1139.

MR. GOWEN: We object to that, because the order does not contain any findings of fact, and it is, therefore, not admissible.

THE COURT: I will overrule the objection, and grant the defendant an exception.

(Exception noted for defendant, by direction of the Court.)

Mr. Glasgow read supplemental order referring to the case of W. F. Jacoby & Company vs. The Pennsylvania Railroad Company, as follows:

"This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 L. C. C., 392, and all the findings and conclusions in said reports are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Co., on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon, at the rate of 6% per annum from June 20th, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has

been found by this Commission to have been unlawful and unjust as more fully and at large appears in and by said reports of the Commission.

By Mr. Glasgow:

Q. Mr. Jacoby, has any part of that award of the Commission been paid to you or to Mr. Weber, or to the firm?

A. No, sir.

(No cross-examination.)

Mr. Glasgow: As I understood, Mr. Gowen has kindly avoided the necessity of bringing anybody here to prove these reports and orders, and that it is agreed by counsel for the defendant that the report and the supplemental report and the two orders that I have read in the record were duly served upon the defendant, the Pennsylvania Railroad Company.

Mr. Gowen: Yes. That is admitted.

Mr. Glasgow: With that admission, we close the case for the plaintiffs.

Plaintiffs Rest.

DEFENDANT'S EVIDENCE.

Mr. Gowen: We offer in evidence the Act of Assembly of the Legislature of Pennsylvania approved April 13th, 1846, entitled, "An Act to Incorporate the Pennsylvania Railroad Company", and call special attention to the provisions of Section 21 thereof.

Mr. Glasgow: I object to that, because an act of that kind regulating the duties of a carrier has no

relevancy whatever since the passage of the Act to Regulate Commerce on the 4th of February, 1887.

THE COURT: What is the purpose of offering that?

MR. GOWEN: It is offered for the purpose of showing the character of the obligation imposed upon the defendant by the Legislature of Pennsylvania in the charter granted to it, in respect to the transportation of cars of shippers.

MR. GLASGOW: I object to it on the ground that that can can have no bearing upon the question in this case, since the passage of the Act to Regulate Commerce. I have no desire to prevent it going in, provided it goes in under my objection and exception.

THE COURT: Do I understand you merely make a pro forma objection?

MR. GLASGOW: I will not make any objection to it.

Mr. Gowen read Section 21 of the Act referred to, as follows:

Public Highway.

"Section 21. That upon the completion of said railroad, or any part thereof, the same shall be esteemed a public highway for the conveyance of passengers and the transportation of freight, subject to such rules and regulations in relation to the same, and to the size and construction of wheels, cars and carriages, the weight of loads, and all other matters and things connected with the use of said railroad, as the president and directors may prescribe and direct; Provided that the said company shall have the exclusive control of

Proviso

the motive power, and may from time to time establish, demand and receive, such rates of toll or other compensation, for the use of the said road, and of said motive power, and for the conveyance of passengers, the transportation of merchandise and commodities, and the cars or other vehicles containing the same, or otherwise, passing over or on said railroad, as to the president and directors shall seem reasonable: Provided, however, nevertheless, That said rates of toll and motive power charges, so as to be established, demanded or received, when the cars used for such conveyance or transportation are owned or furnished by others, shall not exceed two and a half cents per mile for each passenger; three cents per mile for each ton or two thousand pounds of freight; three cents per mile for each passenger or baggage car, and two cents per mile for each burden or freight car, every four wheels being computed a car; and in the transportation of passengers, no charge shall be made to exceed three cents per mile for through passengers, and three and a half cents per mile for way passengers."

Proviso.

Tolls

FRANK C. STRATTON, having been duly sworn, was examined and testified as follows:

By MR. GOWEN:

Q. Where do you reside?

A. Washington, D. C.

Q. You are connected with the Interstate Commerce Commision?

A. Yes, sir.

Q. In what capacity?

A. Docket clerk.

Q. Have you the record before the Commission in the case of W. F. Jacoby & Company against the Pennsylvania Railroad Company, No. 1139?

A. I have.

Q. The record you have is that which is on file with the Commission?

A. Yes, sir.

MR. GOWEN: I offer in evidence the testimony and all of the exhibits appearing in the record of the case before the Commission in the matter of the claim of W. F. Jacoby & Company against the Pennsylvania Railroad Company, No. 1139, produced by the witness.

MR. GLASGOW: Do you offer the briefs?

MR. GOWEN: No. Just the testimony and the exhibits.

MR. GLASGOW: There is some correspondence here. What about that?

MR. GOWEN: I am just offering the testimony and the exhibits.

MR. GLASGOW: I think if you are going to offer any part of it you had better offer it all, and I will agree that it all shall go in.

MR. GOWEN: Our offer is confined to the testimony and the exhibits.

MR. GLASGOW: Then, I object to it. If you will put in all of it, I will not put in any objection.

MR. GOWEN: If your Honor pleases, I think the question can be resolved by a decision of the Supreme Court of the United States in the case of the Interstate Commerce Commission vs. The Louisville and Nashville Railroad Company, which has been rendered in the last few weeks, in 137 U. S.

(Mr. Gowen cited case referred to.)

MR. GOWEN: We offer the testimony before the Commission for the purpose of showing that under the evidence presented, the Commission's finding as to the extent to which the plaintiffs had been discriminated against was not justified by the testimony before it, but that, on the contrary, it was directly in opposition to that testimony, not conflicting testimony, but was in opposition to the only testimony on the subject of the distribution which has been made by the defendant in the region in which the plaintiffs' mine was located.

MR. GLASGOW: Of course, if your Honor please, there never was a controversy that if the Commission did not have any evidence before them, that that might be done. The Commission could not act without evidence. But when Mr. Gowen comes to offer this record, to have this jury pass upon the question of whether the Commission was right on the evidence before them, there is plenty of authority for the proposition that you cannot do anything of that kind. The jury cannot re-try the case on this evidence. This evidence, as far as the conclusions of the Commission goes, is *prima facie* right. The jury is not to review this evidence. If Mr. Gowen will offer the record as it stands, I make no objection.

By MR. GLASGOW:

Q. You have presented here a book numbered 1139, and inside of it are a number of papers. Are there contained within the two backs of this book the entire record before the Commission in this case?

A. I think so, yes. The entire record is contained, with the exception of the oral argument. That was consolidated with another case.

Q. Is there anything in here that is not part of the record in the case, so far as you know?

A. No, sir.

By Mr. Gowen:

Q. There is a great deal of correspondence there, is there not, which is not part of the record?

A. Not part of the record proper. We treat it as part of our record, for our own purposes.

By Mr. Glasgow:

Q. Everything else is part of the record?

A. Everything else is part of the record.

The Court: Mr. Gowen, as I understand it this is offered not for the purpose of showing that the Commission was wrong in finding that the rule was discriminatory, or that the practice was discriminatory, but for the purpose of showing that the Commission was wrong in the amount of damages that it assessed? Is that right?

Mr. Gowen: That there was no testimony before the Commission upon which to predicate the finding which they have made as to the amount of damages.

The Court: As to the amount of damages?

Mr. Gowen: Yes, sir.

The Court: You are confining it to that in offering it?

Mr. Gowen: Yes, sir.

Mr. Glasgow: I object to the introduction of the parts of the record that Mr. Gowen has suggested. I object, first, on the ground that if he offers anything of the record, he must offer all of it; and I further object, on the ground that after the case has been submitted to the Commission upon the evidence which is adduced before it, that the findings of the Commission as to what they think that evidence shows is *prima facie* evidence, and that in order for the defendant to defeat the

recovery it must go and adduce other evidence in defence. In other words, that the jury is not an appellate tribunal to pass upon whether the Commission has properly construed the facts that are set forth in the record.

THE COURT: The exception is sustained, and I will grant an exception to the defendant.

(Exception noted for defendant, by direction of the Court.)

EDMUND C. HALEY, having been duly sworn, was examined and testified as follows:

By MR. GOWEN:

Q. You are employed by the Pennsylvania Railroad Company?

A. Yes, sir.

Q. What position do you hold?

A. I am a clerk in the office of the General Superintendent of Transportation.

Q. What are those papers that you have before you?

A. These are what we call the coal car distribution sheets, showing the records of the cars placed at the mines on the Tyrone Division of the Pennsylvania Railroad.

Q. Between what periods?

A. Covering the period from April 1st, 1904, to October 18th, 1905.

Q. Are those the sheets which were examined by the plaintiffs or their representatives?

A. Yes, sir.

Q. And which were produced before the examiner of the Interstate Commerce Commission?

A. Yes, sir.

(No cross-examination.)

MR. GOWEN: We offer in evidence these sheets produced by the witness, with the understanding that they shall not be written into the record, but that they shall be made the subject of reference for any purpose that either party wants. We have made up certain statements from them, and the other side has certain statements to submit.

MR. GLASGOW: If I knew what kind of statement he is making up from that record, I could probably agree that the sheets should be here for us without being put in evidence. It is perfectly absurd to talk about putting those sheets in evidence and to have anybody know what is in them.

Mr. GOWEN: Suppose we just consider that offer as made, and proceed with the testimony, until we come to that point.

THE COURT: Very well.

JAMES F. CLENNON, having been duly sworn, was examined and testified as follows:

By MR. GOWEN:

Q. Where do you reside?

A. Brooklyn, New York.

Q. What business are you at present engaged in?

A. I am manager of the Sackett & Wilhelms Company, lithographing and printing.

Q. Were you at any time connected with the Audit Company of New York?

A. I was, yes.

Q. What is that company? What business is it engaged in?

A. Public examinations and investigations.

Q. Of accounts?

A. Accounts and everything; engineering, and appraisals.

Q. Were you connected with the Audit Company of New York in 1906?

A. I was.

Q. At that time did you make an examination or did you have charge or supervision of an examination that was made of the distribution sheets of the defendant, showing the distribution of cars made in the Tyrone region?

A. I did.

Q. Was the purpose of that examination in order to ascertain the number of cars of the various classes which had been placed by the Pennsylvania Railroad Company during a series of years at the mines in the Tyrone region?

A. It was.

Q. Did that series of years include April 1st, 1904, to October 18th, 1905?

A. Yes, sir.

Q. Were the results that were reached from the examination of the distribution sheets embodied in any book or document?

A. They were.

Q. Does the book before you show those results?

A. This shows a summary of the distribution for the Tyrone Division.

Q. Month by month, is it, or how?

A. It is by years and by months, and by mines. There is a statement by years, a statement for a period of years, and a statement of months, of the various mines in the Tyrone Division.

Q. Will you refer to the month of April, 1904?

By Mr. Glasgow:

Q. Did you make up that paper that you have?

A. I was in charge of the work on it; yes, sir.

Q. I did not ask you that. I asked you did you make it up?

A. I have not seen the sheet bill. I could not tell you.

Q. How do you know that you were in charge of it, then?
A. I know I had the Tyrone Division.
Q. Look at it and tell me.
A. No, sir. I did not make up the sheet. (After referring to another sheet.)
Q. Who did?
A. Cramer and Lee.
Q. Who are they?
A. They were two employes at the time.
Q. Employes of whom?
A. Of the Audit Company of New York.

By Mr. Gowen:

Q. Take the month of April, 1904. Does that book show the number of cars of the various classes placed at each mine in the Tyrone Region in that month?

Mr. Glasgow: I object to that, unless this gentleman made it up. Then he could testify to what it shows.

By Mr. Glasgow:

Q. You did not make that up, as I understand?
A. No.

Mr. Gowen: It is the commonest thing in the world, for those who have had the supervision of any work which has been done under their direction, work of this character, to simply prove what was done. I suppose it would be impossible to go back through a series of men who compiled all the data under Mr. Clennon's direction. It was finally embodied in that book.

By Mr. Glasgow:

Q. I did not understand you to say that these people, Cramer and Lee, worked under your supervision?
A. Oh, yes.
Q. What do you mean by that?
A. We had about 135 men on that work, and there were four of us in charge.

Q. What do you mean by "in charge"?

A. We had different divisions. I had the Tyrone and a couple of other divisions, and one of the other men had—

Q. You had the Tyrone Division?

A. Yes, sir.

Q. What do you mean by "you had it"?

A. I handled all the work on the Tyrone Division. I had the supervision or the looking after of the work in taking the independent results.

Q. What do you mean, that you told these men to go to the distribution sheets and get that information?

A. No. I gave them the distribution sheets and showed them how to work them up. I gave them all the instructions necessary to work them up, and supervised the work while it was going on.

Q. You never compared that work with the distribution sheets?

A. I would not say that in this case. I have in many cases.

Q. I am asking you about in this case.

A. I would not swear to that.

Q. So you do not know whether they got it accurately from the distribution sheets or not?

A. Oh, yes; I know that. I know they got the totals. I know in totals only.

Q. But you do not know whether the items on it were correct or not?

A. Well, I believe it to be so. It was checked and rechecked.

Q. I did not ask you that. I asked you, do you know? Did you do it?

A. No; I did not do it.

Q. You did not see whether they were doing it correctly or not? They know, but you don't?

A. They don't know any more than I do.

Q. Didn't they do it?

A. That would not make any difference.

Q. Why not?

A. Because I supervised the work and showed them how to do the work.

Q. Did you tell them to get that information from these distribution sheets that you see there?

A. Yes, sir.

Q. And they know they got it, don't they?

A. I know they got it.

Q. How do you know?

A. Because I supervised all the totals.

Q. Did you see—

A. I saw them jotting down the figures.

Q. But you said you did not compare them with the sheets?

A. Not in detail.

Q. How do you know, then?

A. I do not know, any more than the totals of the distribution sheets show.

Q. I am not talking about the totals of the distribution sheets. You don't know whether they were correct or not?

A. Yes, I do.

Q. How?

A. I found the totals here myself were taken from daily sheets, out of the mine summary, and the monthly summary, and if they were not taken care of they would have been out of balance before we got through.

Q. Do you mean to say you can balance up the distribution sheets of coal cars in the Tyrone Division like you can a set of books?

A. We did; yes, sir.

Q. You say you dealt entirely with the totals?

A. The totals.

Q. What I want you to explain is, if you dealt entirely with totals how you know whether the details there are correct?

A. From the mine detail sheets.

Q. You are judging that from the totals you know the details must be correct. Is that it?

A. That is not subject to a yes or no answer.

Q. Yes, it is.

A. I disagree with you.

Q. I can't help that. I am asking the question, and you are here to answer.

A. I won't answer it that way.

Q. You won't answer it?

A. No.

Q. I ask you, is it not because the totals meet with your approval that you then judge that the details are correct?

A. You will have to go further than that.

Q. What else is there that you judge from, that the details are correct?

A. On the proof of the sheets.

Q. What do you mean by the proof of the sheets?

A. Well, your mine sheets. You have got the detail by days for each month of all the mines in the division, and any division, and that was taken on a monthly summary.

Q. Who took it?

A. The employes that I had there and that account was taken on to a mine summary.

Q. Who took that?

A. That was also taken by the employes; and all those sheets as they were finished came up to me. I do not say that I examined every sheet in detail. I examined the most of them.

Q. Now, you just now said you could not tell whether you examined this or not?

A. No. There is no mark on it. I did not sign my name.

Q. If you do not know you better stick to it and say that you do not know about it.

A. I have not said that I did.

Q. You made the totals?

A. Yes.

Q. I am asking you, how do you know that the details there were correct?

A. From a further analysis of the mines, proving out there.

Q. Who analyzed it?

A. The men that were under me.

Q. How do you know they were right?

A. Because it was re-checked and counter-checked and I know they came to it.

Q. Who did it?

A. My men did.

Q. But you did not do the rechecking and counter-checking?

A. The final work I did.

Q. You just said that you did not know anything about the details.

A. I said the detail work. I said the final work I did.

Q. The totals you said you checked?

A. The final work.

Q. You said just now on the stand here that you never checked the details of that work?

A. Well, I have not changed it any. I said the final work I did.

Q. What do you mean by the final work?

A. The final summaries.

Q. The final conclusion?

A. Yes, sir.

Q. The totals?

A. The totals, by myself.

Q. Then, is it not your conclusion that the details are correct because you took the totals?

A. Sure.

Q. Is there any other reason that you have got for it?

A. The other reason is that they were all rechecked and counterchecked.

Q. But you did not do that. How could you tell?

A. In general practice, it would lead you to believe that four or five sets of men—

Q. You do not testify about general practice. I want to know what you know about it. Where are the totals?

A. These are the totals here. (Indicating on sheet.)

Q. What do you mean by that, the total number of cars in the region?

A. The distribution of the cars in the region. The total distribution gives you the cars in the region.

Q. This is a statement showing distribution of coal cars. What did you check on that?

A. I took these totals, the monthly totals.

Q. There is one line here headed, "Tyrone totals".

A. That is it.

Q. You say you took that? You say you checked that?

A. That is it.

Q. What do you mean by checking it?

A. I took the distribution sheets and I took the totals.

Q. You took the distribution sheets and you compared them with the totals here?

A. Yes, sir.

Q. And that shows that the totals on the distribution and the totals here correspond?

A. Yes, sir.

Q. But that did not enable you to tell whether the details of the several mines were accurately taken off, did it?

A. No; but that has been re-checked.

Q. As far as the proportions of the different classes of cars, or the proportions that went to the individual mines, you know nothing about it of your own knowledge, and never had anything to do with verifying it? That is correct, is it not?

A. Not in all instances, no. I could not even pick out an instance where I went into the details; it is too far back.

Q. All you can testify to is that you took the car distribution appearing on the different sheets and saw that they were the same as the totals on this memorandum?

A. Yes, sir; and proved that the mines entitled to the cars there showed that the totals were right.

MR. GLASGOW: I object to this gentleman testifying as to what is in that paper. I know the rule perfectly well, that a man under whose eye the work is done, and who sees that it is going on correctly and properly, can testify to it, but when I come to cross-examine this gentleman about what is on those sheets he absolutely protects himself by saying that he does not know. I want the men who made them up, and then I can get some information from them.

MR. GOWEN: It is manifest, of course, that the distribution sheets themselves, without some compilation made from them, would be absolutely useless and meaningless to anybody. Mr. Clennon, who had charge of this work which we have been referring to for the Audit Company of New York, which was making an examination of these sheets for the purpose of ascertaining what the distribution had been, has testified that all the compilations contained in that book were made under his supervision and direction; that he had charge of the work, and that the work itself was done by about 135 clerks; that he tested that work, and was satisfied of the correctness of the results.

THE COURT: What does this summary consist of, Mr. Gowen? It shows the monthly pro rata allotment, does it?

MR. GOWEN: Yes, sir. The distribution sheets themselves show all the mines, 120 or 130, and the number of cars placed for those mines of the various classes, individual, system and fuel, and so on, each

day in the month. Of course, it is absolutely impracticable for the jury, for any of us, to take these sheets and in the course of the trial work out whether the plaintiffs received their distributive share of cars.

THE COURT: As I understand it, this summary here covers the whole 128 mines that you refer to?

MR. GOWEN: Yes, sir; covers the distribution.

THE COURT: Are the sheets relating to this mine separate from the sheets relating to other mines?

MR. GOWEN: No, sir. They are all the same.

THE COURT: This summary that you have here, does that contain the distribution to this mine on separate sheets?

MR. GOWEN: No, sir. The twenty-five sheets show the distribution that was made for twenty-five days in the month, one taken for the daily reports. Those sheets show, I think, about 120 or 130 mines, and the daily distribution to those mines is shown on those sheets. The Audit Company of New York took those sheets or consolidated each month's sheets so as to show the monthly distribution made to each mine, including the plaintiff's.

THE COURT: So that the items on this summary relating to the plaintiffs' mine are all through that volume?

MR. GOWEN: They appear each month. Each month is stated separately.

THE COURT: In each month that mine is contained in the summary? Is that it?

MR. GOWEN: Yes, sir. Our contention will be that what the plaintiffs are entitled to is to be ascertained

in a certain way; that all the cars for distribution in this region were distributed in this region in which this mine was located, and they are entitled to only their share. Now, in order to find out what that share was, we have got to show, in the first place, the total ratings of the mines in that region, the total number of cars that were distributed, and it is for the purpose of showing that that we have produced these records, and we expect to follow that by proof—we do not have to follow it by proof of those records, because the plaintiffs have proven themselves the number of cars which they got, and that is a matter which we can prove through them.

THE COURT: I understand that, but the question here is as to whether the summary made up by the experts has been properly proved.

MR. GOWEN: I think, so far as the summary is concerned, that it is, because Mr. Clennon has said that these summaries were compared by him himself. It is the detail distribution at each mine, as to which he has been unable to say that those figures were examined and tested by him.

MR. GLASGOW: No. He says that all these figures in the body of that are made by these other two men. He took this line down here, the Tyrone total, and he saw whether that corresponded with the total as it appeared on those distribution sheets.

MR. GOWEN: That is right.

MR. GLASGOW: Now, as to the correctness of all of this in here, he does not know anything except the information which may have come to him from these other two men.

MR. GOWEN: No; I do not think Mr. Clennon said that. Mr. Clennon said that he had tested the totals that you have just referred to.

MR. GLASGOW: By comparing that with the totals on the distribution sheets.

MR. GOWEN: Yes, sir. That he could not say that in every month he had tested the details, but that he had done so in certain months, and had satisfied himself as to their correctness, but he could not say in each month it had been done.

MR. GLASGOW: My objection is that the totals are of no value here, as far as I can see; that the individual daily distribution to the mines, to the individual mines, is the only thing of value, and the men that can give it to us are the only men who know whether they are correct or not. We have done the same thing, and the statement was put in before the Interstate Commerce Commission and we have brought our men here who actually made it up from these sheets.

By THE COURT:

Q. What totals do you refer to when you say, "the totals"?

A. All the totals by days on the monthly summaries, and in a good many instances—

Q. The totals for each mine, do you mean?

A. It was not by mine. There is a total number of mines listed in these sheets, and each day there is a sheet, and we made this up from the daily sheets, and then we summarized this from the monthly sheets. So it simply comes to an adjustment of the summaries.

By MR. GLASGOW:

Q. Do you mean to say that this line of totals was checked by you by checking the distribution sheet off, say in April, 1904, and adding them up to see if they correspond with that?

A. Yes, sir.

Q. That is what you did?

A. Yes, sir; and, as I say, I went over in a great many instances and checked up the details on those sheets.

Q. But I understand you cannot say whether you did that on this or not?

A. Oh, no.

Q. But that is what you mean, that you took the distribution say for the first day in April, 1904, and saw that that distribution showed so much as a total, so many cars in that region?

A. So many of each class.

Q. So many cars of each class in that region, and then you took April 1st and April 2nd and April 3rd, and so on, to see whether the totals corresponded to that?

A. Yes, sir.

Q. But as to whether all of the work which was done on those details toward bringing them into a summary for the month, as to the number of hopper cars and the number of individual cars or the number of company coal cars or commercial cars, showing in each month what proportions of those cars were gotten by each mine, you do not know whether that is correct or not, except from the fact that somebody made it up and you sent them to make it up?

A. In a general way, yes.

THE COURT: What you are attempting to show is that there was a proper distribution, Mr. Gowen?

MR. GOWEN: Yes, sir.

THE COURT: I do not see that the fact that this witness knows that the totals corresponded on the original sheets with the totals on this sheet, that that would have any bearing on the question of the distribution. If he can testify that he verified the figures, the distribution at each mine, made up by these accountants working under him, I think the matter would be sufficiently proven, but I do not see that the fact that the total on the original sheets and the total on the summary corresponded would show

that the distribution in between was correct.

Mr. Gowen: We think that these sheets have been sufficiently identified to justify their admission, and ask, therefore, that these sheets may be put in evidence, that this compilation may be put in evidence for the purpose of showing the distribution made in that region as a whole, and the distribution made at each mine. If your Honor should be against us as to that latter feature, the distribution made to each mile, I want to say the distribution as a whole which was made in the region can be established, in view of Mr. Clennon's testimony, that was verified.

By Mr. Glasgow:

Q. Do the totals in those figures that you have there include the Snowshoe?

A. No, sir. The Snowshoe is separate.

Q. Why did you not put that in there?

A. It was not considered part of the Tyrone Division.

Q. Who did not consider it part?

A. The Pennsylvania Railroad.

Q. Don't you know the evidence in this case showed that it was?

A. Probably the evidence in the case was in after this work was done.

At 1:2 o'clock p. m., the Court took a recess until 2 o'clock p. m.

2 P. M.

Mr. Gowen: If your Honor please, Mr. Glasgow has agreed that the totals shown on this book of the Audit Company may go in evidence, and I do not care to press for the admission of the details, in view of the fact that there are objections to those. There

is an Exhibit which was put in evidence before the Interstate Commerce Commission which embodies the totals shown on those books, and if it is agreeable we will just put the Exhibit in.

Mr. Glasgow: It shows the totals with the Snowshoe Branch left out.

Mr. Gowen: Of course, we think that the Snowshoe Region has nothing to do with this, but we are perfectly willing to get the figures in.

Edmund C. Haley, recalled.

By Mr. Glasgow:

Q. Are those distribution sheets which you produced, the distribution sheets for the Tyrone Division?

A. Tyrone Division; yes, sir.

Q. Does it show on it the Moshannon Branch?

A. It is not designated separately.

Q. Do you know whether it does?

A. The mines on the Moshannon Branch are on there.

Q. Are the mines on the Snowshoe Branch on there?

A. Yes, sir; they are shown separately on the bottom.

Q. The heading of this is "Pennsylvania Railroad—the Pennsylvania Railroad Division. The following is the distribution of coal and coke cars on the Tyrone Division"; and these mines which are listed on that sheet in the first column are the mines on the Moshannon Branch, as well as other parts of the Tyrone Division, and also on the Snow Shoe Branch?

A. Yes.

Q. And on that sheet there is no particular designation of whether the mine which is listed is on the Moshannon Branch

or the Snow Shoe Branch, or any other branch of the Tyrone Division, is there?

A. No, sir.

Q. So that, as far as that sheet would go, it would show a distribution of cars to the whole Tyrone Division, embracing the mines on the Moshannon Branch and the Snow Shoe Branch, would it not?

A. Yes, sir.

Q. Is that the original distribution which was used at the time that the actual distribution of cars was made?

A. It is a carbon copy of it, I think.

Q. It could not be a carbon copy, made with a pen. Is not that some copy of some distribution sheet?

A. It is signed by the superintendent of the Tyrone Division.

Q. But that does not quite answer my question. The question is whether you know whether this is the original sheet which was prepared at the time the cars were distributed.

A. I could not answer that.

Q. You know that there were a number of different distribution sheets in existence, were there not?

A. There were supposed to be original sheets and carbons.

Q. That does not look like a carbon.

A. This is maybe the original.

Q. You do not know whether that is the original? It may have been a copy, or what purports to be a copy, made of the original?

A. I was not on the work at this time.

Q. I say, you do not know; it may have been.

(Not answered.)

Q. Do you not know that there were several sets of distribution sheets, covering the period we are speaking about, car distribution sheets, which did not agree with each other?

A. No, sir; I did not know that.

Q. Your attention was never called to that?

A. No, sir.

Q. Do you know whether that is the sheet which was furnished to Mr. Weber and Mr. Jacoby when they made up the statements for the hearing?

A. Yes, sir; this was the sheet.

Q. That is?

A. Yes, sir.

Re-direct-examination.

By Mr. Gowen:

Q. Mr. Glasgow asked you about the mines on the Snow Shoe Branch, as he called it. Are they shown on this sheet as separated from the mines in the Tyrone Region?

A. Yes, sir; they are.

Q. In the second column of this sheet the per cent. is shown, is it not, which the rating of each mine bears to the total of the region?

A. Yes, sir.

Q. There is a mine shown here as No. 150, which is styled "Barrett (United States Mining Company)" and that shows that that mine, does it not, was entitled to two-tenths of one per cent. of the region distribution?

A. It does, yes.

Q. Then below that there is a total of percentage, which is 100 per cent., is it not?

A. Yes.

Q. Then the mines which are in what has been referred to as the Snow Shoe Region, or as Mr. Glasgow said the Snow Shoe Branch, are shown, and how many are they in number?

A. Three.

Q. The ratings of those mines aggregate what?

A. 100 per cent.

Q. So that there are two 100 per cents. on that sheet?

A. Yes.

Re-cross-examination.

By Mr. Glasgow:

Q. If you would just leave out that first line of totals and add numbers 1, 2 and 3, which are on the Snow Shoe Branch, it would still leave 100 per cent., would it not?

A. You would have to reduce all your other percentages, because this is based on each mine's rating.

Q. Will you tell me, if the Snow Shoe is not in the Tyrone Division, where that paper shows, where is it? What division is it on?

A. It comes under the same superintendent.

Q. If it is not in the Tyrone Division, what division is it on? Can you tell me?

A. It comes under the same superintendent as the Tyrone Division.

Q. How many divisions are there?

A. Altogether?

Q. Eight, are there not?

A. Ten.

Q. On April 1, 1904, there were eight, were there not? Let me name them to you: There was the South Fork—I mean for car distribution—the South Fork, the East End of the Pittsburgh Division, which was called the East End, or Mountain Division; the West End of the Pittsburgh Division, the West Penn, the Monongahela, the Pennsylvania and Northwestern, the Allegheny, the Cambria and Clearfield, and the Tyrone. Those were the divisions, were they not, in 1904, on April 1st?

A. As far as I know, they were. I was not on the car distribution at that time. I am not familiar with that.

Q. There was no division on your road for car distribution that was called the Snow Shoe Division, was there?

A. We keep it separately for all purposes, yes.

Q. But you keep it under the general Division of Tyrone, do you not?

A. We put it on the Tyrone sheet.

Q. There was no division called the Snow Shoe Division?

A. No; it was not called Snow Shoe Division.

Q. And it was under the Tyrone Division superintendent?

A. Yes.

MR. GOWEN: We have agreed, if your Honor please, that the totals which are shown in that book, containing the compilations of the New York Audit Company, shall be put in evidence, and they are embodied in the Exhibit which was before the Commission and we will just ask that that be placed on the record.

MR. GLASGOW: This Exhibit, however, is accompanied by a statement from Mr. Gowen that he will have the Snow Shoe mines made up in the same form.

(For the totals referred to by Mr. Gowen, see testimony of Edmund C. Haley at page 121.)

R. B. FREEMAN, having been duly sworn, was examined as follows:

By MR. GOWEN:

Q. Where do you reside?

A. Tyrone, Pa.

Q. What position have you with the Pennsylvania Railroad Company?

A. Trainmaster of the Tyrone Division?

Q. Were you in that position in 1904 and 1905?

A. I was.

Q. Did your duties as trainmaster extend to the supervision of the distribution of the cars in the coal mines on the Tyrone Division?

A. Yes, sir.

Q. There were three mines—I do not know whether there were more than three mines, but there were three operations whose mines were located in what has been referred to as the Snow Shoe Region. Will you please state what relation existed between the Snow Shoe Region, or Snow Shoe Branch, whatever it was called, and the Tyrone Region as to car distribution?

A. The two regions were considered separate and distinct, so far as the car distribution was concerned.

Q. In other words, the distribution sheets which are before you show that the percentages of the mines in the Tyrone Region aggregate 100 per cent. and the mines in the Snow Shoe Region aggregate 100 per cent.?

A. Exactly.

Q. Respectively?

A. Yes, sir.

Q. How was it as to actually making distribution? Did you treat the mines as in separate regions or as in one region?

A. As separate regions.

Cross-examination.

By Mr. Glasgow:

Q. When you came to make distribution to the Tyrone Division, as compared with the other divisions of the road, how did you get at what proportion the Tyrone was entitled to and what the Snow Shoe was entitled to?

A. I had nothing to do with the distribution except as applied to the Tyrone Division.

Q. Then, after you got the cars to the Tyrone Division is when you came in; is that right?

A. Yes, sir.

Q. So you had nothing to do with the division of the cars as between the divisions?

A. Only as between the Snow Shoe—no, not as between divisions, no.

Q. Then whatever was coming to Snow Shoe and Tyrone were all distributed as between Divisions, to the Tyrone Division?

A. To the two regions; yes, sir.

Q. Was all distributed to the Tyrone and then you subdivided?

A. Yes, sir.

Q. Now then, after you got it to the Tyrone Division, you made a distribution to the three mines on the Snow Shoe Branch?

A. Yes, sir.

Q. And you made a distribution to the mines on the Moshannon Branch?

A. Yes, sir.

Q. And to the other parts of the Tyrone Division?

A. Yes; we called them two regions, Clearfield and Snow Shoe.

Q. How did you get what proportion was to go to the Snow Shoe branch?

A. They get their proportion in accordance with their ratings.

Q. They were rated just like all the other mines on the Tyrone Region?

A. If I recall correctly, the Snow Shoe Region was entitled to approximately ten per cent. of the cars.

Q. But you took all the mines on the Tyrone Division, including the Snow Shoe, and estimated what was the capacity of each mine, did you not?

A. Yes, sir.

Q. And the total capacity of each mine represented 100 per cent.?

A. Yes, sir; each district.

Q. Taking it altogether, it represented 100 per cent., did it not?

A. Each district represented 100 per cent., as I understand it.

Q. What I mean is, suppose you had 1,000 cars on the Tyrone Division and suppose the capacity, as you rated

the capacity of the three mines on the Snow Shoe Branch was 3,000 tons and the total capacity of the mines on the Tyrone Division was 9,000 tons, three times. How did you divide the cars as between the Snow Shoe Branch and the other parts of the Tyrone Division?

A. Approximately 10 per cent. to the Snow Shoe Region and the 90 per cent. to the Clearfield.

Q. That was on the basis that the Snow Shoe capacity was 10 per cent. of the others?

A. Yes.

Q. So that you did divide the cars that were assigned to the whole Tyrone Division, you then subdivided those cars upon a capacity basis between the Snow Shoe Branch and the rest of the Tyrone Division?

A. In order to make an equitable division of both regions in that district.

Q. You made the same kind of a division between the Moshannon Branch and the Tyrone Division, did you not?

A. No; everything except the Snow Shoe Region was considered one district.

Q. I know, but suppose you took the Moshannon Branch?

A. We did not separate the mines of the Moshannon District at all.

Q. Oh, no, you did not separate them, but suppose they showed 10 per cent. capacity. They would get their 10 per cent. of the car distribution?

A. Exactly.

Q. Suppose one mine showed 2 per cent. capacity. It would get 2 per cent. of the entire car distribution to the Tyrone Division, would it not?

A. Of the available cars, yes, sir.

Q. And Snow Shoe, showing 10 per cent., got 10 per cent. of the cars?

A. Yes, sir.

Q. So that while your division, as between the divisions, was to the Tyrone Division, after you got it there you made a separate division among the mines, treating the Snow Shoe Branch as all together; did you not?

A. Yes, sir.

Re-direct-examination.

By Mr. Gowen:

Q. Referring to the mines in the Snow Shoe Region, how many were there?

A. We only show three mines, whereas the mines of the Lehigh Valley Coal Company are grouped. They probably had at that time six or eight mines there, all shown under one heading as the Lehigh Valley operation.

Q. What percentage of the total Snow Shoe ratings was represented by the Lehigh Valley Coal Company mines?

A. About 66 per cent.

Q. About two-thirds?

A. Two-thirds, yes.

Q. Do you know what that coal was used for?

A. We considered it Lehigh Valley supply—

Q. Do you know what it was? Not what you considered it.

A. I know that it was all practically Lehigh Valley supply; fuel coal.

Q. Fuel coal of the Lehigh Valley Railroad Company, you mean?

A. Yes.

Q. Did the Lehigh Valley Railroad Company send in large numbers of its own cars?

A. Practically sufficient cars to fully supply their mines.

Q. Not at all times?

A. No; there were times when we furnished system cars. That would be during periods of depression when there were a number of system cars available.

Re-cross-examination.

By Mr. Glasgow:

Q. You mean by the Lehigh Valley Coal Company this Coal Company that was owned by the Lehigh Valley Railroad?

A. Yes, sir.

Q. And when those cars were sent in, the engines of the Pennsylvania Railroad Company took them when they came on their line, hauled them over the line with their locomotives, loaded them and then carried them back over the lines of the Pennsylvania Railroad?

A. Yes, sir.

Q. Do you not know that, for the year from April 1, 1904, to April 1, 1905, the Pennsylvania Railroad furnished, of its own cars, to the Lehigh Valley Railroad 4,271, and that 4,267 were Lehigh Valley cars?

A. I do not know that without looking at the sheet, but I do not question it at all. That occurred quite frequently.

Q. So you would not say that the Lehigh Valley Railroad Company furnished anything like the cars that were used by that Company?

A. On certain periods, no. When we had play for our own cars we were very glad to use them and save per diem charges on the Lehigh Valley Raliroad cars.

Q. That was the period when your shippers on the Pennsylvania were crying for cars?

A. I do not know about that.

Q. That is true from 1904 to 1905, during the period of this suit?

A. I am not so sure about that.

Q. Will you please explain, then, why it is from April 1, 1904, to April 1, 1905, if you did not have a demand, that everybody was crying for cars, why you did not furnish to Jacoby & Company what they wanted?

A. We gave them their proportion of the cars we had for distribution on the Tyrone Division.

Q. Exactly; after taking out the individual cars and all the foreign fuel cars and all the fuel cars of your own company, whatever was left you gave them their percentage of?

A. Yes.

Q. And the other cars you assigned to these other people that were sending coal out and never charged them against them at all; that is correct, is it not?

A. I believe it is. I am not sure about the period of 1904. It seems to me the cars were subject to allotment during that time.

Q. 1904?

A. I think they were.

Q. Did you ever have any rule charging individual or private cars, or foreign fuel cars, against the allotment of people that got them until January 1, 1906?

A. Yes; I think April, 1905.

Q. You think April, 1905?

A. I think so.

Q. Have you got any such rule that you could produce?

A. I think so. I am not quite positive, but I think I have. I did not understand your question.

Q. It is not a fact that during the period of this case, running up to October, 1905, the cars I have mentioned, individual cars, fuel cars and foreign fuel cars, were all assigned to the people who used them?

A. Yes, sir.

Q. Without charging them against the capacity of their mines?

A. I believe so.

EDMUND C. HALEY, recalled.

By MR. GOWEN:

Q. Based upon the totals ascertained by the Audit Company as the result of its examination of these sheets, what were the total ratings of the mines in the Tyrone Region,

excluding what we have been referring to as the Snow Shoe Region, in the year between April 1, 1904, and April 1, 1905?

A. 232,517.

Q. And the total numbers of the cars of all classes which were placed in the region?

A. 66,504.

Q. What was the percentage, therefore, of the aggregate ratings of the region?

A. 28.6.

MR. GLASGOW: You mean, what is the proportion of the tonnage of the cars that actually went in to the theoretical rating of the region?

MR. GOWEN: Yes,—the actual rating.

By MR. GOWEN:

Q. Coming to the period between April 1, 1905, and—we will have to take October 31, 1905, although the period in action ends October 15, 1905—what were the aggregate ratings of all the mines in the Tyrone Region?

A. 152,934.

Q. And what number of cars of all classes were placed?

A. 45,963.

Q. What percentage of the total ratings is that?

A. 30.1.

Cross-examination.

By MR. GLASGOW:

Q. That excludes the mines which are on the Snow Shoe Branch?

A. What you call the Snow Shoe Branch; yes, sir.

Q. And you are not able to say now what would be those percentages which you have given, if the Snow Shoe Branch was taken in?

A. No; I could not give you that.

Q. Could you tell us the total number of cars that were ordered during that period?

A. Not here; no, sir.

Q. Will not the sheet show it?

A. I would have to compile it.

Q. You cannot tell me, then, the total number of cars ordered?

A. No.

Q. In making up that estimate which you have of the tonnage which went into that field, you are counting one steel car as two wooden cars?

A. Yes, sir.

Q. As a matter of fact, the average of the wooden cars is about 30 tons, is it not?

A. It was considered at that time—you see it was 1904 and 1905—it was considered as 25 tons. A steel 50-ton car we count as two cars.

MR. GOWEN: In this connection, I would like to offer in evidence an Exhibit prepared by the plaintiff and put in evidence before the Interstate Commerce Commission, which was Exhibit No. 10. It comprises two sheets, entitled "Detail Statement showing discrimination in favor of other mines and against Falcon No. 2, from April 1, 1904, to April 1, 1905", the other sheet entitled "Detail Statement showing discrimination in favor of other mines and against Falcon No. 2, from April 1, 1905, to October 15, 1905."

APRIL 1, 1904, TO APRIL 1, 1905.

	Rated capacity based on 308 distribution dys. 32 tns. per car		Shipped based on 32 tns. per car			28% would be		Difference in excess of Falcon No. 2		
	Cars	Tons	Cars	Tons	Per cent.	Cars	Tons	In Cars	In Tons	In p. ct.
Falcon No. 2	4331	138600	1237	38874	28.0					
Electric	4812	154000	2801	89632	58.2	1347	43120	1454	46512	30.2
Lenore	1444	46200	879	67904	60.8	404	12936	475	15192	32.8
Leland No. 1	2888	92400	2122	28128	73.5	809	25872	1313	42032	45.5
White Oak	1323	42350	598	19136	45.2	370	11858	228	7278	17.2
Penn No. 3	2406	77000	1623	51936	67.4	673	21560	950	30376	39.4
Peerless #1, 2, 3	1450	46400	957	30624	68.2	406	12992	551	18632	40.2
Coaldale #11	3128	100100	1612	51584	51.5	876	28028	736	23556	23.5
Betz-Bucher	2566	82100	1244	39808	48.4	718	22988	526	16820	20.4
Corona	2366	75700	1026	32832	43.3	662	21196	364	11636	15.3
Standard No. 7	963	30800	856	27392	88.9	270	8624	586	18768	60.9
B. W. Co. (7 mines)	24260	776325	13452	430464	55.5	6793	217311	6659	213153	27.5
L. V. Coal Co.	12031	385000	8538	273216	70.9	3363	107800	5175	165416	42.9
		1908375	35708	1142656	59.9	16691	534285	19017	609371	

APRIL 1, 1905, TO OCTOBER 15, 1905.

	Rated capacity based on 167 distribution dys 32 tns. per car		Shipped based on 32 tns. per car		23.9%			Difference in excess of Falcon No. 2		
	Cars	Tons	Cars	Tons	Per cent.	would be Cars	Tons	In Cars	In Tons	In p. ct.
Falcon No. 2	2348	75150	541	17973	23.9					
Electric	2609	83500	1376	44032	52.7	624	19968	752	24064	28.8
Penn #5 and 6	1827	58450	1197	38304	65.5	437	20160	760	18144	41.6
Bucher	2088	66800	1398	44736	66.9	334	10688	1064	34048	43.0
Corona	1566	50100	640	20480	40.8	374	11968	266	8512	16.9
Fairmount #2	1305	41750	773	24736	59.2	312	9984	461	14752	35.3
Rabold	1044	33400	757	24224	72.5	250	8000	507	16224	48.6
Penn #3	1305	41750	725	23200	55.5	312	9984	413	13216	31.6
Coaldale #11	1827	58450	1018	32576	55.7	437	13984	581	18592	31.8
Weston	1305	41750	593	18976	45.4	312	9984	281	8992	21.5
Standard #7	522	16700	401	12832	76.8	125	4000	276	8832	52.9
B.W.&Co. 5 mines)	11481	367400	7154	228928	62.3	2744	87808	4410	141120	38.4
		860050	16032	513024	59.6	6261	206528	9771	306496	

Mr. Glasgow: The statement which Mr. Gowen offered, being the totals of distribution for the period covered, headed "Tyrone Region Rating and Cars Placed Therein", (referring to totals given by Edmund C. Haley in the above testimony) was defendant's Exhibit 2 in the hearing before the Interstate Commerce Commission.

Mr. Gowen: It is admitted for the purposes of the case that the distribution sheets for the Tyrone Region show about 150 mines embraced in the region and three mines of the Snow Shoe Branch or region.

William J. Jacoby, recalled for cross-examination.

By Mr. Gowen:

Q. I hand you the plaintiff's Exhibit No. 10 as used before the Interstate Commerce Commission, which has just been put in evidence, which is headed "Detail Statement showing discrimination in favor of other mines and against Falcon No. 2 from April 1, 1904, to April 1, 1905", and another from April 1, 1905, to October 15, 1905, there being two sheets, and ask you whether that was prepared by you or under your direction?

A. Jointly by Mr. Weber and I; yes, sir.

Q. And it was prepared by you after an examination made of the distribution sheets of the defendant, was it not?

A. Yes; made from the distribution sheets.

Q. Now in stating the number of cars which were placed at the mines, which are enumerated in that Exhibit, you included cars of all classes, did you not?

A. Yes, sir.

Q. That is, the individual and private cars, the fuel cars of the defendant and all other railroad companies, and the so-called system cars of the Pennsylvania Railroad Company?

A. All cars; yes, sir.

Q. Take the Berwind-White Coal Mining Company. For the first period how many cars do you show as having been delivered at the mines of that company?

A. 13,452 cars.

Q. Referring to another statement which I understand you also prepared and which I hand you, will you state how many of the 13,452 cars were system cars of the Pennsylvania Railroad?

A. 460.

Q. All the other cars which were delivered to the Berwind-White Coal Mining Company were either the private or individual cars of the company or were fuel cars of the defendant?

A. Yes, sir.

Q. Now coming to the second period, how many cars do you show in that exhibit as having been placed at the mines of the Berwind-White Coal Mining Company?

A. 7,154.

Q. Referring, then, to the statement which you have just referred to, will you please say how many of those cars were system cars of the Pennsylvania Railroad?

A. 60.

Q. All the balance of the 7,154 cars were then either the private or individual cars of the Berwind-White Coal Mining Company, or their fuel cars?

A. Yes, sir.

Q. You yourself made the selection, did you not, of the mines embraced in that statement?

A. Yes, we did. I took the most active mines in the region at that time and most active shippers.

Q. Did you not take the mines which showed the largest percentage of cars received?

A. The most active shippers—no, not necessarily. I took those that were the most active shippers.

Q. Necessarily does not that mean the most active shippers

were the men that had the most number of cars?

A. That shipped most regularly, yes. Some of those mines were idle or abandoned, not working for some reason or other and disabled, and therefore we took the most active shippers for comparison, because we were in shape to ship at all times.

Q. How many days were you in a position to ship during the first period, that is, between April 1, 1904, and April 1, 1905? Before answering this question, will you please look at the paper I hand you, which is Exhibit No. 5, which was put in evidence on your behalf in the proceedings before the Interstate Commerce Commission, and then say what that shows.

A. The actual days the mine was capable of producing its full daily capacity was 275.

By Mr. Glasgow:

Q. That is for the year ending March 31, 1905?

A. Yes, sir.

By Mr. Gowen:

Q. Was it not idle on all other days, due to holidays or to accidents at the mine which prevented its operation?

A. The other days it was idle was due to Sundays, legal and miners' holidays, accidents and delays caused by accidents to the mines.

Q. Now taking the second period from April 1, 1905, to October 15, 1905, how many days was the mine capable of working?

A. 138¼ days.

Q. And all other days it was prevented from working due to causes which you have just referred to as in the first period?

A. Yes.

Q. Now in that statement, coming again then into Exhibit No. 10, will you please state whether you estimated the greatest capacity of your mine on the basis of 275 days in the first period?

A. No, we used the number of days for which we had distribution sheets, which was 308 days. That applied to our mine, however, as well as to all the rest of them. That is simply a matter that did not have any bearing on the percentage one way or the other. The same percentages would have existed in reality as they do this way.

Q. Then, as the result of using 308 days instead of 275, you of course very largely increased the aggregate rated capacity of your mine, did you not? I will not say very largely, but largely, increased the aggregate rated capacity of your mine, did you not?

A. Apparently that is the case. However, the same method was applied to all mines.

MR. GLASGOW: I think you ought to call attention, because it is not in evidence, to the fact that Exhibits 5 and 6 are a statement as to Falcon alone. Exhibit 10, which you are talking about, is a comparative statement as between it and other mines and the basis upon which the comparative statement goes is made on the basis that the same number of Sundays, the same number of holidays and the same number of delays by accident would apply to all the mines.

By MR. GOWEN:

Q. Now, as the result of increasing your aggregate rated capacity, you of course considerably decreased the percentage which the cars placed bore to the capacity? In other words, if your aggregate capacity had been less and you got the same number of cars, the percentage would have increased?

A. Would have been somewhat greater, yes.

Q. In the second period how many days did you use in arriving at the aggregate capacity of your mine?

A. There were 167 distribution sheets and we used 167 days.

Q. As against 138¼ which you say your mine was capable of working?

A. Yes, sir.

Q. And with the same result, of course, as to showing a decreased percentage of cars placed?

A. Yes, sir. Exactly the same method applied there as in the former case.

SIDNEY J. SANDERS, having been duly sworn, was examined as follows:

By MR. GOWEN:

Q. Referring to the order which has been put in evidence made by the Interstate Commerce Commission, finding a certain amount as due Jacoby & Company, will you please say whether you have taken the daily rating fixed by the Commission as proper, namely, 450 tons per day, and multiply that by 275 days, the days which the Commission found the plaintiff's mine would have been able to work in the year ending March 31, 1905, and tell us what the aggregate number of tons is, based upon those two figures?

A. 123,750 tons.

Q. In that same order the Commission has found that the plaintiff shipped in that period 38,714.23 tons and that they ought to have received cars which would have enabled them to ship 35,412.02 tons additional. If they had made those additional shipments what would the total volume of shipments have been?

A. 74,126.25 tons.

Q. What percentage of the aggregate capacity of the mine, based upon 450 tons per day and 275 days, are the aggregate shipments which would have been made, which you have just spoken of?

A. 59.9 per cent.

Q. Coming to the second period of the action, the Commission found that 450 tons per day was a proper rating for the mine and that the mine would have been capable of

working 138¼ days. What, on that basis, is the aggregate capacity of the mine in that period?

A. 62,212.51 tons.

Q. In their order the Commission found that in that period the mine had shipped 17,973.88 tons and that it should have received cars which would have enabled it to ship 19,104.77 tons additional. If it had made those additional shipments, what would have been the total shipments in that period?

A. 37,078.65 tons.

Q. And what percentage is that of the aggregate rated capacity based on 450 tons a day and 138¼ days.

A. 59.6.

Cross-examination.

By Mr. Glasgow:

Q. Will you go just a little further and tell us, if you have worked it out, the same way as to the other mines on the same division, what would have been their shipments?

A. I have not the answer for that.

Q. Of course not, and therefore your calculation of these mere figures is not worth anything on the proposition of discrimination as between this mine and others, is it?

Mr. Gowen: That is a matter of argument.

Q. If the question is one of discrimination, your figures there would not be of any value unless you knew what the other fellow was getting, would they?

Mr. Gowen: That is a question of argument. The witness cannot answer legal questions.

A. I cannot answer that.

Defendant Rests.

PLAINTIFF'S REBUTTING EVIDENCE.

ISAAC C. WEBER, having been duly sworn, was examined as follows:

By MR. GLASGOW:

Q. Something was said about the Berwind-White Coal Company getting, during the period from April 1, 1904, to April 1, 1905, a total of 13,452 cars and of that 460 cars were what they called commercial coal, 1774 was what they called company coal. That company coal was shipped by the Berwind-White Coal Company in cars of the Pennsylvania Railroad Company, consigned to the Pennsylvania Railroad Company at such points as they might designate, was it not?

A. I think so.

Q. In other words in that statement the term "company coal" means coal carried in the cars of the Pennsylvania Railroad?

A. I think so; yes, sir.

Q. Did you make up this plaintiff's Exhibit 10 before the Interstate Commerce Commission, which has been offered in evidence by Mr. Gowen? (Showing witness Exhibit.)

A. Yes, sir; Mr. Jacoby and I together made it up.

Q. Made it up from the distribution sheets of the Pennsylvania Railroad?

A. Yes, sir.

Q. And on that basis of statement, that is a comparative statement with other mines for the purpose of showing discrimination as between several mines, is it not?

A. Yes, sir.

Q. Exhibit 5, to which Mr. Gowen has referred, is an Exhibit worked up alone as to the Falcon No. 2 mine, showing the number of days it was in operation, is it not?

A. Yes, sir; it is.

Q. During the period covered by this suit?

A. Yes, sir.

Q. Of course, is it true or not that the other mines would not be working on Sundays and holidays, just as the Falcon was not working?

A. Yes, the same rule would apply to all mines.

Q. Then when you came to make the comparative statement and Exhibit No. 10 referred to, as between several mines, you took it as equally applicable to all, 308 days that there was distribution?

A. Yes, sir, we took that right from the days the distribution sheets were issued.

Q. And applied that to all equally on the question of discrimination?

A. Yes, sir.

Q. You ascertained, as I understand, that in the year from April 1, 1904, to April 1, 1905, and took in the first column, the rated capacity of the Falcon mine in cars and had it as 4331 cars for that period; is that correct?

A. That is correct, 4331 cars.

Q. That means, as I understand, that if it had gotten sufficient cars to carry the entire output that the company had been able to raise from its machinery and workings for 308 days, that it would have used 4331 cars?

A. Yes.

Q. Then you reduced that cars to number of tons, did you not?

A. Yes.

Q. And you used 32 tons to the car, did you not?

A. Yes, sir.

Q. Why did you use that figure?

A. I cannot tell you just why. This statement was made up a good while ago; but I think we had taken the actual number of steel cars and wooden cars and had proportioned in that way.

Q. Showing the actual shipment?

A. Yes; I think so.

Q. Then that showed that during that year—

A. Just a minute, as explanatory. We used that same basis on the whole.

Q. On all of them?

A. Applied to all the working out of the table.

Q. So that it was a factor that you used in all of the mines in this table?

A. The same figure relative to each individual mine.

Q. That showed that Falcon No. 2 on that basis would have shipped 138,600 tons during the year?

A. Yes, sir.

Q. Then the next figure shows the number of cars that you actually got there, does it not?

A. Yes, sir.

Q. How much was that?

A. 1,237.

Q. And you actually shipped how much?

A. 38,174 tons.

Q. You actually shipped what percentage of your capacity?

A. 28 per cent.

Q. Now will you take Standard No. 7? Do you see that?

A. Yes, sir.

Q. Was that a mine on the Tyrone Division?

A. Yes, sir.

Q. Its rating in cars—

A. On the same calculation.

Q. —was how much, in rating of cars?

A. 963 cars.

Q. And in tons for the year?

A. 30,800 tons.

Q. How many did it ship in tons?

A. It shipped 856, or 27,392 tons.

Q. It shipped during that year what percentage of its rated capacity?

A. 88.9 per cent. of the rated capacity.

Q. What was the percentage you shipped?

A. 28 per cent.

Q. So they shipped 60 per cent. more than you did?

A. Yes, sir; 60.9 per cent. more.

Q. Take the Berwind-White Coal Mining Company. During the same year that you shipped 28 per cent. of your capacity, what per cent. of its capacity did the Berwind-White Coal Mining Company ship?

A. 55.5.

Q. What percentage of its capacity did the Lehigh Valley Coal Company ship?

A. 70.9.

Q. As against the 28 which you shipped?

A. Yes, sir.

Q. Take Leland No. 1 mine. Is that on the Tyrone Division?

A. Yes, sir.

Q. During the same period that you shipped 28 per cent. of your capacity, what percentage of its capacity did Leland No. 1 ship?

A. Leland No. 1 shipped 73.5 per cent.

Q. Then the statement for the period from April 1, 1905, to October 15, 1905, is worked out the same way, showing capacity and the proportion of the capacity shipped by your mine as compared with the others?

A. Exactly the same way.

Q. During the period covered by this suit, there were 153 mines on those distribution sheets, on the Tyrone Division, including the Moshannon Branch and the Snow Shoe Branch, to which, on its distribution sheet, the railroad assigned a percentage rating; that is correct, is it not?

A. Yes.

Q. Is it not a fact that during that year and during the following nine months or ten months of the next year, that there were mines on that branch, or on that

division, which while they were assigned a rating for car distribution, were out of commission, idle, abandoned mines?

A. There were quite a large number of them. I think the basis of comparison covering this number of mines, whatever it is, represents about, 60 or 65 per cent. of the entire output of the Tyrone Division—I think so.

Q. In other words, the mines you worked up, the shipping mines, were about 65 or 66 per cent. of the entire rating that was made in the region?

A. I think so, yes, sir, if I remember correctly. There were a large number of idle mines.

Q. When you say idle mines or abandoned mines, you mean mines that did not want cars distributed?

A. Yes, sir.

Q. And did not order cars?

A. Did not order cars; yes, sir.

Cross-examination.

By Mr. Gowen:

Q. You have testified, in answer to Mr. Glasgow, that, counting all the cars which you have embraced in this statement as to Berwind-White Company's mines, this Exhibit 10, they shipped 68 per cent, in one period, I have forgotten which one it was.

A. 55.5, I think, in one period. I do not remember the other period.

Q. Have you made any calculation to find out what percentage was shipped by the Berwind-White Coal Company in Pennsylvania Railroad cars?

A. That estimate of shipment includes all the cars they received, as shown by the distribution sheets.

Q. In the second period you show that they shipped, or this statement shows, that they shipped 62.3 per cent. of their capacity and that in the period they got 60 Pennsylvania Railroad cars. How much could they ship in 60 cars, based on 32 tons a car?

A. 60 times 32.

Q. About 1900 tons?

A. Yes.

Q. And this statement shows that the aggregate capacity of cars of the Berwind operation was 7154, so that they shipped between two and three per cent., did they not, of their capacity in Pennsylvania Railroad cars in that period?

A. That statement shows the exact number of cars received. That 60 cars, I think, is—

MR. GLASGOW: That 60 does not include fuel cars.

By MR. GOWEN:

Q. It received 60 Pennsylvania Railroad cars, exclusive of those which were placed for fuel cars, which was 843, Mr. Glasgow said. As a matter of fact, they were able to ship in those 60 cars less than 3 per cent., were they not, of their mines' rating, which was given here as 7154 cars?

A. I would like to answer that question indirectly. If I remember correctly—we worked on those sheets in 1906—my recollection is that the assignment of Berwind cars was not made to each individual mine; they were made collectively which this sheet would show: Each day 40, 50, 60 or whatever the case may be, cars assigned. The table I have prepared there shows the sum total of cars received for each month, as taken off the distribution sheets, with so many cars assigned per day to Berwind-White operation.

Q. Mr. Glasgow also called attention to the percentage that Standard 7 had been enabled to ship. Do you not know that it was shipping in private cars?

A. I do not know whether they were or not.

Q. You do not know whether they were or not?

A. No. I do know they were receiving cars.

Q. You also said, in answer to a question of Mr. Glasgow, referring to the fuel cars of the defendant which had been placed at the Berwind-White Company's mines, that those cars were placed at those mines and loaded with fuel coal, consigned by the Berwind Com-

pany to points to which the shipments were to be made. Now you know, surely, that the Pennsylvania Railroad Company always buys its fuel coal delivered at the mine?

A. Yes.

Q. And it simply places its cars there to be loaded with that coal and then hauls those cars away to whatever destination it wants to take the coal to, and the shipper has nothing to do with the consignment of the cars; is not that so?

A. This may seem like a peculiar answer to the question, but we knew at the time we were operating that there was a lot of that coal that was marked as fuel coal had gone to commercial uses.

Q. I am speaking of coal that was fuel coal that was hauled.

A. Hauled as fuel coal and sold in the market as commercial coal.

Q. You know some cases of that sort?

A. Yes.

Q. Now I ask you whether the fuel coal which was actually fuel coal of the Pennsylvania Railroad Company was not delivered by the operators from whom that coal was purchased, to the Pennsylvania Railroad Company at the mines?

A. If that was shipped as commercial coal, I guess it was.

Q. You know what I am asking you. I am asking you whether that was true as to the fuel coal; not as to coal which was shipped as commercial coal, but as to the fuel coal?

A. Yes, that is true. As applied to fuel coal, that is true.

By Mr. Glasgow:

Q. If it was fuel coal, they were told where to ship it, even if the Pennsylvania Railroad received it in its cars?

A. Certainly.

By Mr. Gowen:

Q. You stated that you thought the shipments made by these selected mines which are embodied in Exhibit 10 represented from 60 to 65 per cent. of the total shipments made from the Tyrone Region?

A. Yes, sir; I think so.

Q. You heard the testimony, did you not, that in the first year, that is from April 1, 1904, to April, 1906, the cars placed at the mines in that region aggregated 66,504. That leaves out the Snow Shoe. You heard that testimony, did you not?

A. Mr. Freeman testified to that, I think.

Q. If it is correct that the cars placed at the mines in the Tyrone Region, exclusive of the Snow Shoe, amounted to over 66,000 in number in this first year, what percentage of that total number is represented by the cars placed at the mines included in this Exhibit, excluding therefrom the Lehigh Valley Coal Company mines which are in the Snow Shoe Region?

A. I could not answer that without figuring it.

Q. How many cars does this Exhibit embrace which were placed at mines in the Tyrone Region, and by that I mean to exclude the cars placed at the Lehigh Valley Coal Company's mines?

A. That would be 35,708 less 8,538.

Q. That would be about how many?

A. About 27,000.

Q. What percentage is that of 66,000? A little over 40, is it not?

A. I think so.

Q. 40 per cent. of 66 would be 26,400?

A. That is right.

Q. What is the total number of cars placed at the mines which are embraced in this Exhibit?

A. 16,032.

Q. Now, assuming as correct the testimony which has been given here that over 45,000 cars were placed at the mines in the Tyrone Region in that period, what

percentage of the total number is represented by these mines?

A. About 30 per cent.

Q. It is more than that?

A. It would not be quite 30 per cent.

S. L. CLARK, having been duly sworn, was examined as follows:

By MR. GLASGOW:

Q. Who is Mr. J. O. Clark?

A. A brother of mine.

Q. He is president of the Clark Coal Mining Company?

A. Yes, sir.

Q. What is your business?

A. Coal business.

Q. Where do you reside?

A. In Camden, N. J.

Q. Do you know whether a letter was received by your brother, as president of the Clark Coal Mining Company, dated March 6, 1907, from Mr. M. Trump, general superintendent of transportation of the Pennsylvania Railroad?

A. Yes, sir.

Q. Is this the letter? (Showing witness letter.)

A. Yes, sir; that is the letter.

MR. GLASGOW: We offer that letter in evidence.

MR. GOWEN: That letter was written in 1907 and relates to a period of time a year or so after the period covered by this action.

MR. GLASGOW: Do you insist upon the objection?

MR. GOWEN: Yes.

MR. GLASGOW: I withdraw the letter.

PLAINTIFF RESTS.

TESTIMONY CLOSED.

(At 4 p. m. adjourned until Tuesday, March 4, 1913, at 10 a. m.)

Philadelphia, Tuesday, March 4th, 1913, 10 a. m.

Present: parties as before noted.

MR. GOWEN: Yesterday, if your Honor please, it was understood that a certain statement which had been put in evidence before the Commission, which was referred to in the testimony here as the defendant's exhibit No. 2, should go in evidence in this case. We did not have a copy of it at that time, and I now produce a copy, and ask that it be inserted in the record.

The paper is as follows:

DISTRIBUTION OF CARS PLACED IN THE TYRONE REGION.

Month & Year	Region Rating in Cars	Fuel Cars of Deft.	Individual or private cars	Other cars
1904				
April	18,434	958	1,526	3,234
May	17,725	901	1,418	3,411
June	18,460	752	1,241	2,570
July	18,125	601	1,242	2,280
Aug.	19,689	703	1,156	2,991
Sept.	18,179	698	1,049	3,070
Oct.	19,545	904	1,407	3,242
Nov.	19,564	1,148	1,696	3,195
Dec.	20,548	1,650	1,640	3,215
1905				
Jan.	20,740	1,338	1,642	2,637
Feb.	19,194	1,720	2,066	2,045
March	22,314	1,135	3,167	2,856
April	20,750	1,540	2,135	2,491
May	21,580	1,527	1,900	2,753
June	21,580	1,879	1,866	2,163
July	21,550	1,577	1,706	2,762
Aug.	23,286	1,671	1,882	2,399
Sept.	21,620	1,991	2,245	3,027
Oct.	22,568	2,781	2,555	3,113
Total	385,451	25,474	33,539	53,454

MR. GOWEN: It was also understood that we would produce statements showing the aggregate ratings of the mines in the Tyrone Region, including in that region what has been referred to as the Snow Shoe Region, and the aggregate number of cars placed in the region, including also the Snow Shoe. Those statements have been prepared, and with consent of counsel for the plaintiff I ask that they be inserted in the record.

The papers are as follows:

TYRONE REGION (Including Snow Shoe Region).

April, 1904, to March, 1905, Inc.

Month		Region Rating in Cars Inc. Snow Shoe Reg.	Total Cars placed Inc. Snow Shoe Reg.
April	1904	20,384	6,317
May	"	19,600	6,652
June	"	20,410	5,145
July	"	20,000	5,295
August	"	21,714	5,312
September	"	20,054	5,748
October	"	21,495	6,462
November	"	21,439	6,899
December	"	22,498	7,514
January	1905	22,690	6,869
February	"	20,994	6,912
March	"	24,339	8,305
Total		255,617	77,430

TYRONE REGION (Including Snow Shoe Region).

April, 1905, to October, 1905, Inc.

Month		Region Rating in Cars Inc. Snow Shoe Reg.	Total Cars placed Inc. Snow Shoe Reg.
April	1905	22,625	6,385
May	"	23,530	6,784
June	"	23,530	6,415
July	"	23,425	6,572
August	"	25,311	6,412
September	"	23,495	8,017
October	"	24,518	9,250
Total		166,434	49,834

EDMUND C. HALEY, heretofore sworn, recalled and examined and testified as follows:

By MR. GOWEN:

Q. Referring to the statement for the period between April 1st, 1904, and April 1st, 1905, which shows the aggregate ratings of all the mines in the Tyrone Region, including those in the Snow Shoe Region, and the aggregate number of cars placed in all those mines, will you please say what percentage the cars placed were of the aggregate ratings of cars?

A. 30.3 per cent.

Q. And in the second period, taking the aggregate ratings of all the mines in that region, including the Snow Shoe Region, and the aggregate number of cars placed, what percentage did the cars placed reach of the aggregate ratings?

A. 29.9 per cent.

TESTIMONY CLOSED.

Counsel for the respective parties argued the case to the jury.

CHARGE OF THE COURT.

Hon. J. Whitaker Thompson, *J.*

Gentlemen of the Jury: This suit is brought to recover damages from the Pennsylvania Railroad Company by reason of alleged unjust and unlawful discrimination in the distribution of coal cars on the Tyrone Division of the Pennsylvannia Railroad. The suit is brought under what is known as the Act to Regulate Commerce. That Act forbids any carrier from making or giving undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The Act further provides that in case any common carrier, subject to its provisions, does anything prohibited by the Act, declared by the Act to be unlawful, or fails to do anything which the Act directs it to do, the carrier shall be liable to the person injured to the full amount of damages sustained by reason of the violation of the Act.

The Interstate Commerce Act further provides when any shipper makes complaint to the Interstate Commerce Commission of any unjust or unlawful discrimination which it is alleged has been practiced against it, that the Interstate Commerce Commission shall hear the complaint, and if it finds that the practice is unjustly and unlawfully discriminatory, it shall prescribe what shall be the just and lawful practice, and order the carrier to desist from the unlawful practice. It also gives the Commission authority to award damages to any person who claims to be injured by such unlawful and unjust discrimination, and after that order is made, if the carrier does not pay the amount which the Commission has ordered it to pay, then the party complaining may bring suit in the

United States Courts based on the order of the Commission, and that is how this case comes before you.

The plaintiffs here presented a claim to the Interstate Commerce Commission, and the parties were all there, and the Commission made certain findings and orders in the case, which have been offered in evidence before you. The Act makes the findings and orders of the Interstate Commerce Commission *prima facie* evidence of the facts therein stated, so that if the plaintiff comes into court and offers in evidence those findings and orders of the Commission, that, on its face, would be sufficient to entitle him to a verdict, unless the defendant should rebut the presumption raised in favor of those findings by additional evidence.

In this case the plaintiffs have offered in evidence the findings and orders of the Commission, in their favor, and they are entitled to weight as *prima facie* evidence—that is to say, they are, on their face, correct, unless the defendant has produced sufficient evidence to overcome the *prima facie* effect of those findings, and has convinced you, satisfied you, of another state of facts than that set out in the findings and orders.

The Commission's findings of fact you have heard read, and they find, among other things, that the practices employed in the distribution of coal cars in this particular case were unjust and discriminatory, and they stated in their original order wherein they are unjust and discriminatory, and they forbade the Railroad Company, the carrier, from continuing that practice of distribution. I will read the order of the Commission on that subject: "It appearing that it is and has been the defendant's rule, regulation and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods to deduct the capacity in tons of foreign railway fuel cars, private cars and system fuel cars, in the record herein referred to as "assigned cars", from the rated capacity in tons

of the particular mine receiving such cars, and to regard the remainder as the rated capacity of that mine in the distribution of all 'unassigned cars': It is ordered, That the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated, and is in violation of the third section of the Act to Regulate Commerce", and the order then continues with a prohibition against the defendant carrier from continuing to carry out that rule of distribution. The Interstate Commerce Commission further finds certain facts in relation to the distribution of cars to the plaintiff in this case. They find under the rating of the mine in question to which there was no objection by either party, that the rating was a fair rating, and that is 450 tons per day. They further find during the period during which the mines were operated, during the two periods, which they call the first and second period, the first period running from April 1st, 1904, to March 31st, 1905, and the second period from March 31st, 1905, to Oct. 18th, 1905—they find during the first period the mine was operated 275 days, and during the second period 138¼ days. Then, they find the number of tons which were actually shipped from the mines during those respective periods, and the number of tons that would have been shipped if the complainants had received their fair share of cars available for distribution. They further find the selling price of the coal for the first period, and the selling price for the second period, and they find what would have been the cost of production, based on an economical basis to the complainants on that coal, and what the profit would have been if they had received their full distribution of cars. They then find what the actual cost of production was, owing to the shortage of cars and what the difference between the actual cost of production and the economical basis they had determined it

could have been produced for was; they find what those two costs were, and compute the difference between that, and award the complainants, as damages first the difference between the economical cost of production and the market price of the coal, or, in other words, the profits on the transactions they would have made if they had received the proper amount of cars. Then, they award them an additional sum for damages for increased cost in output upon the coal that was actually shipped, and you have heard the figures which they have arrived at, and for which they have made an order on the defendant to pay.

Now, that is the *prima facie* finding of the Commission, and it is entitled to weight with you as being correct on its face, unless the defendant has produced evidence to show that some other state of facts exists, and that the plaintiffs have not suffered the damages which the Commission has awarded to them.

Now, the defendant has offered in evidence certain sheets showing what the total number of cars available during this period was and it has also offered evidence to show what the percentage would have been which should have gone to each shipper of coal in that locality, based on his possible daily output. The Commission has decided the manner of distribution of coal cars, and that is a question with which you have nothing to do. There findings on that subject are conclusive, as far as this Court and Jury are concerned. They find that the Railroad Company during this period was deducting from certain favored shippers a number of certain classes of cars which they received—that is to say, foreign fuel cars, private cars, and what were known as system fuel cars. They were deducting those cars from the number of cars which the certain favored mines required, and then giving them their percentage on the remainder out of the distributable cars which remained in their hands, and the Commission found that that was an unfair practice, that the number of private cars, company fuel cars, foreign fuel

cars, assigned to any mine, should have been deducted from the *pro rata* share of that mine, and charged against their share. They found that that was not done in this case, and that is the ground on which they based their damages. The defendant claims that the Railroad Company had no right to divert the cars belonging to a certain mine, private cars, from their owner, and that is correct. As I understand the ruling of the Commission, it is that while private cars shall be placed at the mine where they belong, and while that mine is entitled to its *pro rata* share, those cars cannot be distributed to any other mine, and the same way with foreign fuel cars, which in this case I understand belonged to the Lehigh Valley Coal and Iron Company or the Lehigh Valley Railroad Company, one or the other—at any rate, they were foreign fuel cars, and they were destined to certain points and received fuel for some other railroad company, and as to those cars they could not be diverted to other mines, but they must be charged against the allotment of the particular mine which receives them. As to the company fuel cars, the Pennsylvania Railroad Company fuel cars, they must be treated in the same way. That is to say, the mines receiving them must be charged with them, the same as though they were what are known as commercial cars.

Now, the defendant has offered evidence to show that the complainants did get approximately their full percentage of cars in the distribution. I think they claim that they were entitled to some 28 per cent., and that they got that percentage of cars. If you are satisfied from the evidence that this is the case, then, of course, they suffered no damage. The defendant also claims that the findings of the Interstate Commerce Commission are not sustained by the evidence which has been produced here. He cannot go back of the evidence before the Interstate Commerce Commission. We have to take the findings of the Commission in connection with the

other evidence in the case. If you are satisfied, however, that the distribution of system cars was such that the complainants got the percentage which they ought to have gotten, then they are not entitled to recover. If you are satisfied that they got some other percentage, or some percentage which would diminish the amount of damages which have been awarded by the Interstate Commerce Commission, they are only entitled to recover to the extent to which they are damaged by the failure to get the full percentage of cars. The law provides that a shipper shall recover the full amount of damages which he sustains, and in arriving at the amount of damages which these plaintiffs sustained, you can only take into consideration whether they have been discriminated against, and to what extent they were damaged by that discrimination. If one company got half of the cars which were distributable for that system, when it was only entitled to one-quarter, then the amount that the other shippers, the other mine owners, would be damaged, would be the amount to which their share would be diminished by giving that larger allotment to somebody else. In other words, if the Berwind-White Company got fifty-nine per cent. of its output, when the average allottable was twenty-eight per cent., it does not necessarily follow that the complainants would be damaged the entire difference between twenty-eight per cent. and fifty-nine per cent. They would be damaged the amount to which their number of cars would be reduced in the general allotment by favoring somebody else and taking the cars from them.

So that, if you find that the percertage of the complainants here was not reduced, the percentage which they should have gotten on a percentage basis, the cars distributable to that locality, if you find they got their full percentage then, of course, they cannot recover, but if you find that the percentage which they should have gotten was higher than what

they did get, then they suffered by reason of the difference in the number of cars allotted to them, and you would have to estimate their damages.

Now, if it comes to an estimate of damages by you, I do not know of any better rule to follow than that adopted by the Interstate Commerce Commission in this case. This is a case where these people were carrying on a continuous business. They have been in business for a length of time, the plant has been in operation, and if they are entitled to damages, their damages would be based on the loss of profits,—that is to say, the difference between the reasonable cost of production of the coal and the market price of the coal during that period on coal which they were unable to ship and could have shipped and would have had a market for if they were not prevented by reason of the acts of the defendant in failing to supply them with cars. They would also be entitled to the difference between the actual cost of production and the cost they would have been put to to produce the coal if they had not been discriminated against, as to the coal which they actually produced and shipped. The other rule would apply to coal which they would have shipped or might have shipped, if you find they would have shipped it, if they had not been discriminated against in the distribution of cars.

The defendant has asked me to charge you on certain points. I will refuse the first to the fourteenth points, inclusive.

"15. It was the duty of the defendant to apportion and deliver to the plaintiffs their fair share of all the cars available during the period of the action, for shippers in the district in which the plaintiffs' mine was located. If the plaintiffs received their fair and proper share of the cars so distributed in the district, they have no cause for complaint against the defendant upon the ground of discrimination.

and the burden is upon the plaintiffs to establish by satisfactory proof, that they did not receive their share."

I affirm that point.

"16. The defendant was obliged to place the private or individual cars of shippers at the mines of the owners of the cars, without regard to the consideration that the delivery of these cars gave to the owners thereof a larger percentage of their mines' rating than other shippers received who were not owners of private or individual cars."

I affirm that point, provided that the owners of cars were charged with those cars the same as though they had been the commercial cars of the Railroad.

"17. The defendant was at liberty to purchase during the period of the action coal for the use of its locomotives from any shippers on its line that it thought it to its interest to deal with, and to place cars at the mines of those from whom it purchased the coal into which the coal might be loaded without, thereby, subjecting itself to any charge or claim of discrimination upon the part or at the instance of any other shipper."

I affirm that point, with the same qualification as the last point.

"18. The defendant was obliged to place cars of other railroad companies, intended for their fuel supply, which were delivered to it by the companies owning such cars at the mines to which they were consigned, and the placing of such cars at these mines did not subject the paintiffs to any discrimination or disadvantage of which they can legally complain or for which they can recover in this action."

I affirm that point, with the same qualification as the last point.

The 19th and 20th points are refused.

Mr. GOWEN: If your Honor please, we would except to the following portions of your charge:

That portion of your charge in which you read to the jury the order of the Commission, and accompanied it with the statement that that embodied findings of fact which they should consider as such.

(Exception noted for defendant, by direction of the Court.)

Mr. GOWEN: Also that portion of your charge in which you instructed the jury that during the period of the action the evidence showed that the Railroad Company was deducting from certain favored shippers certain cars, company, fuel and individual cars. Our objection to that is that there is no evidence that those shippers were favored, except as a result of the system in force; that there was no personal favoritism. I do not know whether your Honor intended that.

The COURT: Gentlemen of the Jury, I do not want you to be misled by what I said about favored shippers. In speaking of shippers under this Act, the Act provides that carriers shall not discriminate against or in favor of anybody. I did not mean when I referred to favored shippers, shippers which were favored by the Railroad Company, but shippers which were alleged in this case to have received advantages which the plaintiffs did not receive in the distribution of coal cars.

Mr. GOWEN: We also except to that portion of your charge in which you instructed the jury that if they should find that the plaintiffs were entitled to a smaller percentage of the cars than the Commission found that they were entitled to, that the Jury was at liberty to reduce the damages awarded by the Commission to that extent. Our view is that this is an action to recover the award.

(Exception noted for defendant, by direction of the Court.)

MR. GOWEN: Also to that portion of your charge in which you instructed the Jury that if the Berwind-White Company got fifty-nine per cent. and the plaintiffs twenty-eight per cent., that it did not—you used the word "necessarily"—necessarily follow that the plaintiffs were damaged to the extent of the difference. I think, if your Honor please, that in giving that instruction, that the region percentage was what they were concerned with, that they should have been instructed absolutely that the plaintiffs were not entitled merely upon that showing to recover damages based upon the fifty-nine per cent.

(Exception noted for defendant, by direction of the Court.)

MR. GOWEN: Also to that portion of the charge where you instructed the Jury that in determining the plaintiffs' damages they should be ascertained with reference to the profit which the Jury should find they could make on coal for shipment on cars.

(Exception noted for defendant, by direction of the Court.)

MR. GOWEN: We also except to the refusal to charge as requested in the points that your Honor refused.

(Exception noted for defendant, by direction of the Court.)

MR. GLASGOW: We except to your Honor's affirmance of the defendant's points, which your Honor affirmed.

(Exception noted for plaintiff, by direction of the court.)

The points, submitted on behalf of the defendant, which were refused by the Court, are as follows:

"1. The Interstate Commerce Commission was without au-

thority to make the award upon which the action is based, as its jurisdiction does not extend to the consideration and adjudication of claims for damages or reparation of the character of that embraced in the present action. The plaintiffs, therefore, are not entitled to recover, and the verdict must be for the defendant.

2. The award made by the Commission is invalid, because there was left open for further consideration the question whether the whole amount awarded was properly payable to the plaintiffs.

3. To justify the Commission in making the award for the recovery of which this action has been brought, it must have been shown or established to its satisfaction by the evidence adduced before it that the plaintiffs had not received their proper share of the cars placed by the defendant, in the distribution of which the plaintiffs were entitled to participate, and which were used for interstate commerce or transportation. It appears that no evidence was presented to the Commission bearing upon this point, and that the award of the Commission was based upon the theory that whether the plaintiffs had been subjected to discrimination forbidden by the Interstate Commerce Act was to be determined by ascertaining whether they had received their proper share of all cars in the distribution of which they were entitled to participate, and not merely their share of the cars used for interstate commerce or transportation. The award consequently was invalid, and the plaintiffs are not entitled to recover.

4. The award of the Interstate Commerce Commission is based upon the conclusion that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine rating for 275 days, and in the period between April 1, and October

18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine rating for 138¼ days. It is apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located, had been equal in the earlier period to 59.9% and in the later period 59.6% of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have been placed at the plaintiffs' mine, the basis for the Commission's award was an erroneous one, and the plaintiffs consequently are not entitled to recover.

5. It has been affirmatively established by the evidence adduced upon the part of the defendant that if distribution had been made of its cars in accordance with the method prescribed by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9% of the rating of their mine, and in the period between April 1, 1905, and October 18, 1905, cars equal in capacity to 59.6% of the rating of their mine. As the award of the Commission was based upon the theory that cars equal in capacity to these percentages should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover.

6. It appears that there were included in the cars placed at the mines which the plaintiffs' testimony tended to show had received cars equal in capacity to 59.9% and 59.6% in the two periods of the aggregate of their mines' rating, individual or private cars of shippers, fuel cars of the defendant, and fuel cars of other railroad companies. The plaintiffs were not entitled to participate in the distribution of cars of

either of these three classes, and consequently the percentages which these selected mines received should not have been used as the basis for ascertaining the number of cars which the plaintiffs should have received, even upon the assumption that the number of cars placed at these selected mines furnished the standard by which the number should be ascertained which the plaintiffs should have received. The adoption, therefore, by the Interstate Commerce Commission of the percentages received by these mines as the standard for the ascertainment of the number which the plaintiffs should have received was an error, and the award made in favor of the plaintiffs was consequently invalid.

7. Under the law and the evidence the plaintiffs are not entitled to recover, and your verdict should be for the defendant.

If the Court should decline to charge as above requested, then it is respectfully asked to charge as follows:

8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover.

9. If the jury find that if the defendant had made distribution of its cars in accordance with the method prescribed as proper by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9% of the rating of their mine, and in the period between April 1, 1905, and October 18, 1905, cars equal in capacity to 59.6% of the rating of their mine, and that the award of the Commission was based upon the theory or conclusion that cars equal in capacity to these percentages, respectively, should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover.

10. The rating for purposes of car distribution given by the defendant to the plaintiffs' mine was 450 tons a day, the equivalent of 18 cars. This was a fair and proper rating, and subjected the plaintiffs to no undue or unjust discrimination.

11. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 232,517 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 66,504. The cars thus delivered were, therefore, equal to 28.5% of the ratings. That in this same period the plaintiffs received cars equal to 28% of their mine's rating. Had they received cars equal to the region rating, viz., 28.5%, they would have received additional cars equal to 00.5% of the aggregate of their mine's rating, and as this was 4301 cars they would have received 22 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the

defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region) regardless of the consideration that in the distribution of some of these cars they were not entitled to participate.

12. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 152,934 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 45,963. The cars thus delivered were, therefore, equal to 30.1% of the ratings. That in this same period the plaintiffs received cars equal to 23.9% of their mine's rating. Had they received cars equal to the Region rating, viz., 30.1% they would have received additional cars equal to 6.2% of the aggregate of their mine's rating, and as this was 2348 cars, they would have received 146 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region) regardless of the consideration that in the distribution of some of these cars they were not entitled to participate.

13. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region, (including those in the Snow Shoe Region) aggregated 255,617 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 77,430. The cars thus delivered were, therefore, equal to 30.3% of the ratings. That in this same period the plaintiffs received cars equal to 28% of their mine's rating. Had they received cars equal to the region rating, viz., 30.3%, they would have re-

ceived additional cars equal to 2.3% of the aggregate of their mine's rating, and as this was 4301 cars, they would have received 98 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region) regardless of the consideration that in the distribution of some of these cars they were not entitled to participate.

14. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region, (including those in the Snow Shoe Region) aggregated 166,434 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 49,834. The cars thus delivered were, therefore, equal to 29.9% of the ratings. That in this same period the plaintiffs received cars equal to 23.9% of their mine's rating. Had they received cars equal to the region rating, viz., 29.9%, they would have received additional cars equal to 6% of the aggregate of their mine's rating, and as this was 2348 cars, they would have received 141 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of these cars they were not entitled to participate.

19. The damages, if any, sustained by the plaintiffs consequent upon their inability to mine and ship an addi-

tional amount of coal, cannot properly be measured by the estimated profit which would have accrued to them on such additional output. As the plaintiffs have presented no evidence from which the jury can ascertain or measure the damages upon any other basis, the recovery must be confined to nominal damages.

20. There is no evidence that would warrant the jury in finding that the plaintiffs, under the theory of distribution prescribed as proper by the Interstate Commerce Commission, were entitled, in the period of the action, to any more cars than they received, because no evidence has been presented which would warrant the jury in finding that the plaintiffs had received in this period fewer cars than they were entitled to if in arriving at the number of cars for distribution among shippers generally, there were to be excluded the private or individual cars of shippers, the fuel cars of the defendant, and the fuel cars of other Railroad Companies consigned by them to certain mines."

STIPULATION.

IT IS STIPULATED that the reports and orders of the Interstate Commerce Commission filed with the plaintiff's statement of claim, are and shall be a part of the Bill of Exceptions in this case, but instead of printing the same twice, the reports and orders aforesaid shall be printed with the statement of claim, and being so printed, may be referred to as a part of the Bill of Exceptions.

F. I. Gowen,
for Deft.

Wm. A. Glasgow, Jr.,
for Plff.

March 24th, 1913.

And thereupon, the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the defendant did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this eighth day of April, 1913.

J. W. THOMPSON,
District Judge.
(Seal)

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO.

Filed March 8, 1913.

And now, to wit, March 8, 1913, counsel for the defendant move the Court to have all the evidence taken upon the trial duly certified and filed, so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
Counsel for Defendant.

ORDER OF COURT.
Filed April 4, 1913.

Before THOMPSON, *J.*

And now, to wit, this 4th day of April, 1913, IT IS ORDERED that the motions for new trial and for judgment *non obstante veredicto* be denied.

BY THE COURT,
Attest:
LEO A. LILLY,
Deputy Clerk.

ORDER OF COURT.
Filed May 19, 1913.

Before THOMPSON, *J.*

And now, to wit, this 19th day of May, 1913, plaintiff having presented to the Court the record in this case before the Interstate Commerce Commission, and upon oral statement in open court in the presence of counsel for defendant as to the services performed before the Interstate Commerce Commission, and in this court,

IT IS ORDERED that counsel for plaintiff be allowed a counsel fee of Twenty-five Hundred ($2500) Dollars for his services in the proceedings before the Interstate Commerce Commission; and a further fee of Twenty-five hundred ($2500) Dollars for his services in the proceedings in this court.

FURTHER ORDERED that an exception be granted to the allowance by the Court of a fee to counsel for plaintiff for services in the proceedings before the Interstate Commerce Commission, and also to the amount of the fee

allowed for services before the Commission, and also to the amount of the fee allowed for services in this court.

BY THE COURT,

Attest:

GEORGE BRODBECK,
Deputy Clerk.

PRÆCIPE FOR JUDGMENT.

Filed May 21, 1913.

Enter judgment in favor of plaintiff and against defendant in the above entitled cause in the sum of Twenty-eight thousand five hundred and seventy-two dollars and fifty-four cents ($28,572.54) as per verdict of the jury.

WM. A. GLASGOW, JR.,
Attorney for Plaintiff.

JUDGMENT.

Before THOMPSON, *J.*

And now this 21st day of May, 1913, in accordance with præcipe filed judgment is hereby entered on the verdict in the above entitled case in favor of the plaintiff and against defendant in the sum of Twenty-eight thousand five hundred and seventy-two and 54-100 dollars ($28,572.54).

Attest:

LEO A. LILLY,
Deputy Clerk.

PETITION FOR WRIT OF ERROR.
Filed May 21, 1913.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

And now, May 21, 1913, comes The Pennsylvania Railroad Company, defendant herein, and says that on or about the twenty-first day of May, 1913, this Court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this Petition.

Wherefore, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Third Circuit for the correction of errors so complained of, and that the transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
Attorneys for Defendant.

ORDER OF COURT.
Filed May 21, 1913.

Before THOMPSON, *J.*

And now, May 21, 1913, upon motion of Francis I. Gowen and John G. Johnson, attorneys for the defendant, and upon filing a Petition for a Writ of Error and

Assignment of Errors, it is ordered that a Writ of Error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Third Circuit, the judgment heretofore entered herein, and the amount of bond on said Writ of Error be and is hereby fixed in the sum of $57,145.08.

BY THE COURT,
Attest:
GEORGE BRODBECK,
Deputy Clerk.

Assignments of Error.

Filed May 21, 1913.

And now, The Pennsylvania Railroad Company, defendant in this cause, files with its Petition for a Writ of Error the following Assignments of Error, upon which it will rely upon its Appeal from the judgment in this court entered in this cause, and which appear in the record and proceedings in this cause:

I.

The learned trial Judge erred in admitting in evidence the Report of the Interstate Commerce Commission of May 7, 1910, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, vs. The Pennsylvania Railroad Company, No. 1139.

II.

The learned trial Judge erred in admitting in evidence the Order of the Interstate Commerce Commission of May 7, 1910, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company vs. The Pennsylvania Railroad Company, No. 1139.

III.

The learned trial Judge erred in admitting in evidence the Supplemental Report of the Interstate Commerce Commission of March 11, 1912, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, vs. The Pennsylvania Railroad Company, No. 1139.

IV.

The learned trial Judge erred in admitting in evidence the Supplemental Order of the Interstate Commerce Commission of March 11, 1912, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, vs. The Pennsylvania Railroad Company, No. 1139.

V.

The learned trial Judge erred in refusing to admit in evidence the testimony and exhibits appearing in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, vs. The Pennsylvania Railroad Company, before the Interstate Commerce Commission, No. 1139.

VI.

The learned trial Judge erred in refusing to affirm the first point submitted by the defendant, as follows:

> "1. The Interstate Commerce Commission was without authority to make the award upon which the action is based, as its jurisdiction does not extend to the consideration and adjudication of claims for damages or reparation of the character of that embraced in the present action. The plaintiffs, therefore, are not entitled to recover, and the verdict must be for the defendant."

VII.

The learned trial Judge erred in refusing to affirm the

second point submitted by the defendant, as follows:

> "2. The award made by the Commission is invalid, because there was left open for further consideration the question whether the whole amount awarded was properly payable to the plaintiffs."

VIII.

The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:

> "3. To justify the Commission in making the award for the recovery of which this action has been brought, it must have been shown or established to its satisfaction by the evidence adduced before it that the plaintiffs had not received their proper share of the cars placed by the defendant, in the distribution of which the plaintiffs were entitled to participate, and which were used for interstate commerce or transportation. It appears that no evidence was presented to the Commission bearing upon this point, and that the award of the Commission was based upon the theory that whether the plaintiffs had been subjected to discrimination forbidden by the Interstate Commerce Act was to be determined by ascertaining whether they had received their proper share of all cars in the distribution of which they were entitled to participate, and not merely their share of the cars used for interstate commerce or transportation. The award consequently was invalid, and the plaintiffs are not entitled to recover."

IX.

The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:

> "4. The award of the Interstate Commerce Commis-

sion is based upon the conclusion that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings for 275 days, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine rating for 138¼ days. It is apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located, had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have been placed at the plaintiffs' mine, the basis for the Commission's award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

X.

The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, as follows:

"5. It has been affirmatively established by the evidence adduced upon the part of the defendant that if distribution had been made of its cars in accordance with the method prescribed by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9% of the rating of their mine, and in the period between April 1, 1905, and October 18, 1905, cars equal in capacity to 59.6% of the rating of their mine. As the award of the Commission was based upon the theory that cars

equal in capacity to these percentages should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover."

XI.

The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant, as follows:

"6. It appears that there were included in the cars placed at the mines which the plaintiffs' testimony tended to show had received cars equal in capacity to 59.9% and 59.6% in the two periods of the aggregate of their mines' rating, individual or private cars of shippers, fuel cars of the defendant, and fuel cars of other railroad companies. The plaintiffs were not entitled to participate in the distribution of cars of either of these three classes, and consequently the percentages which those selected mines received should not have been used as the basis for ascertaining the number of cars which the plaintiffs should have received, even upon the assumption that the number of cars placed at these selected mines furnished the standard by which the number should be ascertained which the plaintiffs should have received. The adoption, therefore, by the Interstate Commerce Commission of the percentages received by these mines as the standard for the ascertainment of the number which the plaintiffs should have received was an error, and the award made in favor of the plaintiffs was consequently invalid."

XII.

The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, as follows:

"7. Under the law and the evidence the plaintiffs

are not entitled to recover, and your verdict should be for the defendant."

XIII.

The learned trial Judge erred in refusing to affirm the eighth point submitted by the defendant, as follows:

"8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

XIV.

The learned trial Judge erred in refusing to affirm the ninth point submitted by the defendant, as follows:

"9. If the jury find that if the defendant had made distribution of its cars in accordance with the method prescribed as proper by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9% of the rating of their mine, and in the period between April 1, 1905, and

October 18, 1905, cars equal in capacity to 59.6% of the rating of their mine, and that the award of the Commission was based upon the theory or conclusion that cars equal in capacity to these percentages, respectively, should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover."

XV.

The learned trial Judge erred in refusing to affirm the tenth point submitted by the defendant, as follows:

"10. The rating for purposes of car distribution given by the defendant to the plaintiffs' mine was 450 tons a day, the equivalent of 18 cars. This was a fair and proper rating, and subjected the plaintiffs to no undue or unjust discrimination."

XVI.

The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

"11. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 232,517 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 66,504. The cars thus delivered were, therefore, equal to 28.5% of the ratings. That in this same period the plaintiffs received cars equal to 28% of their mine's rating. Had they received cars equal to the region rating, viz., 28.5%, they would have received additional cars equal to 00.5% of the aggregate of their mine's rating, and as this was 4301 cars, they would have received 22 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs

would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region) regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XVII.

The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

"12. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 152,934 cars, and that the cars of all classes delivered by the defendant at those mines aggregated 45,963. The cars thus delivered were, therefore, equal to 30.1% of the ratings. That in this same period the plaintiffs received cars equal to 23.9% of their mine's rating. Had they received cars equal to the Region rating, viz., 30.1%, they would have received additional cars equal to 6.2% of the aggregate of their mine's rating, and as this was 2346 cars, they would have received 146 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of those cars they were not entitled to participate."

XVIII.

The learned trial Judge erred in refusing to affirm the thirteenth point submitted by the defendant, as follows:

> "13. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region (including those in the Snow Shoe Region) aggregated 255,617 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 77,430. The cars thus delivered were, therefore, equal to 30.3% of the rating. That in this same period the plaintiffs received cars equal to 28% of their mine's rating. Had they received cars equal to the region rating, viz., 30.3%, they would have received additional cars equal to 2.3% of the aggregate of their mine's rating, and as this was 4,301 cars, they would have received 98 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, and if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XIX.

The learned trial Judge erred in refusing to affirm the fourteenth point submitted by the defendant, as follows:

> "14. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region (including those in the Snow Shoe Region) aggregated 166,434 cars, and that the cars of all classes de-

livered by the defendant at these mines aggregated 49,834. The cars thus delivered were, therefore, equal to 29.9% of the ratings. That in this same period the plaintiffs received cars equal to 23.9% of their mine's rating. Had they received cars equal to the region rating, viz., 29.9%, they would have received additional cars equal to 6% of the aggregate of their mine's rating, and as this was 2,348 cars, they would have received 141 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XX.

The learned trial Judge erred in refusing to affirm the nineteenth point submitted by the defendant, as follows:

"19. The damages, if any, sustained by the plaintiffs consequent upon their inability to mine and ship an additional amount of coal, cannot properly be measured by the estimated profit which would have accrued to them on such additional output. As the plaintiffs have presented no evidence from which the jury can ascertain or measure the damages upon any other basis, the recovery must be confined to nominal damages."

XXI.

The learned trial Judge erred in refusing to affirm the twentieth point submitted by the defendant, as follows:

"20. There is no evidence that would warrant

the jury in finding that the plaintiffs, under the theory of distribution prescribed as proper by the Interstate Commerce Commission, were entitled in the period of the action, to any more cars than they received, because no evidence has been presented which would warrant the jury in finding that the plaintiffs had received in this period fewer cars than they were entitled to if in arriving at the number of cars for distribution among shippers generally, there were to be excluded the private or individual cars of shippers, the fuel cars of the defendant, and the fuel cars of other Railroad Companies consigned by them to certain mines."

XXII.

The learned trial Judge erred in refusing the defendant's motion for judgment *non obstante veredicto* upon the whole record.

XXIII.

The learned trial Judge erred in allowing a counsel fee for the services of the plaintiffs' counsel in the proceeding before the Interstate Commerce Commission.

XXIV.

The learned trial Judge erred in allowing a counsel fee of $2,500 for the services of the plaintiffs' counsel before the Interstate Commerce Commission.

XXV.

The learned trial Judge erred in allowing a counsel fee of $2,500 for the services of the plaintiffs' counsel before the learned trial Court.

XXVI.

The learned trial Judge erred in entering judgment in favor of the plaintiffs, against the defendant, upon the verdict of the jury.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
Attorneys for Defendant.

PRÆCIPE.

Filed May 23, 1913.

To the Clerk of the District Court of the United States for the Eastern District of Pennsylvania:

In making up the Transcript of Record Sur Writ of Error in the above entitled case, you will please omit the following papers:

Defendant's Motion and Reasons for New Trial.

FRANCIS I. GOWEN,
Attorney for Defendant.

UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF PENNSYLVANIA. } *set:*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of pleas and proceedings in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading under the firm name of W. F. Jacoby & Company, v. Pennsylvania Railroad Company, No. 2008, June Session, 1912, as per præcipe filed, a copy of which is hereto attached, now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 31st day of May, in the year of our Lord one thousand nine hundred and thirteen, and in the one hundred and thirty-seventh year of the Independence of the United States.

(SEAL)

WILLIAM W. CRAIG,
Clerk District Court U. S.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1755.

PENNSYLVANIA RAILROAD CO., Plaintiff in Error,
vs.
W. F. JACOBY et al., Defendants in Error.

And afterwards, to wit, on the 14th and 15th days of October, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, *and* the Court not being fully advised in the premises, takes further time for the consideration thereof.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1755.

PENNSYLVANIA RAILROAD CO.
vs.
W. F. JACOBY & CO.

Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington, and McPherson, Circuit Judges.

In order to be guided to a proper decision of the controversy appearing upon the record of this writ of error, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court; and accordingly certifies the following questions, under section 239 of the Judicial Code:

W. F. Jacoby & Co. owned and mined coal from land situated along the railroad of the Pennsylvania Railroad Co., and shipped the coal over the road in interstate commerce. They believed themselves to be injured by what they averred to be discriminating practices in the Railroad's distribution of cars. Thereupon, they made proper complaint of such practices to the Interstate Commerce Commission, and thereafter the Commission held hearings, and both parties presented evidence and arguments. In due course the Commission made two reports, finding inter alia that the practices complained of had been discriminating during the period in question, and ordering them to be abandoned. The Commission reported inter alia as follows:

"We find that by reason of the discriminations asserted and set forth in our report in Jacoby vs. P. R. R. Co., 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907."

The Commission also made the following order:

"It is ordered that the above-named defendant (Penna. R. R. Co.) be, and it is hereby authorized and directed to pay unto complainant- W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Co., on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of six per cent. per annum from June 20, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

The Railroad Company did not comply with the order of reparation, whereupon Jacoby & Co. in due form prosecuted to trial in the District Court a petition under section 16 of the Act to Regulate Interstate Commerce. At the trial the two reports of the Commission, including the foregoing finding and order, were admitted in evidence on behalf of Jacoby & Co., and were submitted to the jury.

The questions upon which the Circuit Court of Appeals desires instruction are these:

This being a suit for damages under section 16 of the Interstate Commerce Act,

(1) Were the two reports of the Commission as a whole (including the finding and the order quoted above) prima facie evidence of the matters therein contained?

(2) Were the finding and the order quoted above—or was either of them—prima facie evidence of themselves, or of itself, that the defendant had become liable to Jacoby & Co. in some amount by the discriminating practices referred to?

(3) If the finding and the order—either, or both, of them—were prima facie evidence that the defendant had become liable in some amount, were they—or was either of them—prima facie evidence also of the amount of such damage?

(Signed) GEORGE GRAY,
JOSEPH BUFFINGTON,
JOHN B. McPHERSON,
Circuit Judges.

Feb. 26, 1914.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Pennsylvania Railroad Co. vs. W. F. Jacoby & Company on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-third day of June in the year of our Lord one

thousand nine hundred and fifteen and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Pennsylvania Railroad Company is plaintiff in error and W. F. Jacoby & Co. are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of June, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 24,194. Supreme Court of the United States, No. 464, October Term, 1914. Pennsylvania Railroad Company vs. W. F. Jacoby & Co. Writ of Certiorari. Received & Filed Jun- 21, 1915. Saunders Lewis, Jr., Clerk.

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby make return to the annexed writ of certiorari issued out of the Supreme Court of the United States in the case therein entitled, on the sixteenth day of June, A. D. 1915, by annexing hereto a certified copy of the Transcript of Record in said case.

In testimony whereof, I hereto set my hand and affix the seal of the United States Circuit Court of Appeals at the City of Philadelphia, State of Pennsylvania, this twenty-third day of June, A. D. 1915.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[Endorsed:] File No. 24,194. Supreme Court U. S., October term, 1915. Term No. 139. Pennsylvania Railroad Co., pl'ff in error, vs. W. F. Jacoby et al. Writ of certiorari and return. Filed June 25, 1915.

FILED
MAY 26 19
CLERK OF THE

IN THE

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 1322 October Term, 1916.

Pennsylvania Railroad Company,
Plaintiff-in-Error,

vs.

W. F. Jacoby and Isaac C. Weber, Co-partners, trading under the firm name of W. F. Jacoby & Company,
Defendants-in-Error.

PETITION AND MOTION OF DEFENDANTS-IN-ERROR FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO REQUIRE THE WHOLE RECORD AND CAUSE TO BE SENT UP TO THE SUPREME COURT, TOGETHER WITH A COPY OF THE CERTIFICATE OF SAID COURT OF APPEALS.

WM. A. GLASGOW, JR.,
Counsel for Petitioners.

Law Print Publishing Company, 344 Walnut Street, Phila.

IN THE

Supreme Court of the United States.

October Term, 1914. No. 464.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, Co-partners, trading under the firm name of W. F. JACOBY & COMPANY,
Defendants-in-Error.

PETITION OF DEFENDANTS-IN-ERROR, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO REQUIRE THE WHOLE RECORD AND CAUSE TO BE SENT UP TO THE SUPREME COURT, TOGETHER WITH COPY OF CERTIFICATE OF SAID COURT OF APPEALS.

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioners, W. F. Jacoby and Isaac C. Weber, co-partners, trading under the firm name of

W. F. Jacoby & Company, respectfully petitioning, show unto your Honors:

That in a certain proceeding under the provisions of Section 16 of the Act to Regulate Commerce, entitled *Pennsylvania Railroad Company, Plaintiff-in-Error, vs. W. F. Jacoby and Isaac C. Weber, co-partners, trading under the firm name of W. F. Jacoby & Company, Defendants-in-Error*, then pending in the United States Circuit Court of Appeals for the Third Circuit, the Honorable Judges of the Court of Appeals of said Circuit have certified to this Court, which certificate is docketed as No. 464 of October Term, 1914, certain questions or propositions of law concerning which said Circuit Court of Appeals desired the instructions of this Court for the proper decision thereof by said Court of Appeals.

That a copy of said certificate is appended hereto and made a part of this petition; and that there is submitted herewith a certified copy of the transcript of the record, including all proceedings in said Circuit Court of Appeals.

That the whole cause of action and entire controversy is shown by the pleadings; that the facts stated in the certificate of the said Third Circuit Court of Appeals, and the record aforesaid shows that this was a proceeding under Section 16 of the Act to Regulate Commerce, begun by your petitioners by a petition filed in the District Court of the United States for the Eastern District of Pennsylvania, in accordance with the procedure prescribed in Section 16 of the Act to Regulate Commerce, to recover reparation in damages from the Pennsylvania Railroad Company, defendant below and plaintiff-in-error, for an alleged undue and unjust discrimination against your petitioners and in favor of certain other competing persons

and corporations in the distribution of coal cars by said Pennsylvania Railroad Company among the mines upon the Clearfield Division of said railroad, on which said Division your petitioners, during the period from April 1, 1904 to October 18, 1905, were mining and shipping coal as lessees and operators of a certain coal mine known as Falcon No. 2.

Your petitioners show that the acts and injuries, for which reparation is claimed, took place and occurred between April 1, 1904, and October 18, 1905; that in June, 1907, your petitioners duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of defendant to the prejudice of petitioners and in violation of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory and supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainants therein reparation in damages to such an amount as it might be ascertained that said complainants had thereby suffered. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1139, Opinion No. 1564, dated March 7, 1910.

After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of fact and of law on the part of complainants and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission

on March 11, 1912, ordering the defendant to make reparation to petitioners "in the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by the Commission to have been unlawful and unjust as more fully and at large appears in and by said reports of the Commission."

Whereupon your petitioners, on July 19, 1912, filed their petition, aforesaid, in the United States District Court for the Eastern District of Pennsylvania, setting forth the above facts and praying that said Court enter judgment in favor of petitioners and against the said defendant, the Pennsylvania Railroad Company, for the sum of Twenty-seven thousand, three hundred and thirty-two dollars and fifty-five cents ($27,332.55), as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs including a reasonable attorney's fee. That a demurrer filed to said suit on September 18, 1912, was, on November 12, 1912, dismissed by said Court. That on November 16, 1912, the defendant (Pennsylvania Railroad Company) pleaded not guilty, and, the case coming on for trial before the Court and a jury, a verdict was rendered, on March 4, 1913, as follows:

> "And afterwards, to wit, on the 4th day of March, 1913, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages in the sum of Twenty-eight Thousand Five Hundred and Seventy-two and 54-100 ($28,572.54) Dollars."

That motions for new trial and for judgment *non obstante veredicto* were denied, and upon May 19, 1913, the Court entered an order "that counsel for plaintiff be allowed a counsel fee of Twenty-five Hundred

($2500) Dollars for his services in the proceedings before the Interstate Commerce Commission; and a further fee of Twenty-five hundred ($2500) Dollars for his services in the proceedings in this court."

That on May 21, 1913, the Court entered judgment "on the verdict in the above entitled case in favor of the plaintiff and against defendant in the sum of Twenty-eight thousand five hundred and seventy-two and 54-100 dollars ($28,572.54)." That on May 21, 1913, a writ of error was allowed to the United States Circuit Court of Appeals for the Third Circuit. That on the 26th day of February, 1914, certain questions raised in this proceeding were certified to this Court by the Circuit Court of Appeals for the Third Circuit, as by said copy of certificate hereto appended more fully appears.

Your petitioners show that the questions certified to this Honorable Court were in fact and in effect the same questions raised in certain other cases then pending before this Court, to wit, *Meeker, Surviving Partner, &c., vs. Lehigh Valley R. R. Co.*, and *Meeker vs. Lehigh Valley R. R. Co.*, being Nos. 434 and 435 of October Sessions, 1914 of this Court, which said cases were finally determined in this Court on February 23, 1915, and are reported in 236 U. S., pp. 412, 434, certain of the questions of law there determined being the same which were certified to this Court in the present proceeding; and your petitioners further show that said questions of law, certified as aforesaid, were decided in said cases of *Meeker, Surviving Partner, &c., vs. Lehigh Valley R. R. Co.* and *Meeker vs. Lehigh Valley R. R. Co.*, in entire and substantial accord with the contention of your petitioners in the present case, in which said present case the same or exactly similar questions were certified for the determination of this Court.

Your petitioners show that the alleged wrongful acts and practices out of which this present suit arose occurred in 1904 and 1905, and that a proceeding before the Interstate Commerce Commission, preliminary to an action to recover damages for the same, was begun in 1907; and said Interstate Commerce Commission has finally determined the fact of such acts or practices and the unjust and unlawful character of such acts and practices, and ascertained and assessed the damages sustained by your petitioners by reason of such unjust and unlawful acts and practices, the final finding of the Commission being handed down on March 11, 1912; and that judgment was duly had in the United States Court of the Eastern District of Pennsylvania on May 21, 1913, for the amount of the damages so ascertained and assessed.

Your petitioners aver and believe, that, had the certificate of the Honorable Judges of the Circuit Court of Appeals brought up the entire record and all matters in connection therewith, all doubts as to the power of the United States District Court to proceed herein and to enter judgment in the manner and amount appearing in said record would be resolved by this Honorable Court in favor of your petitioners. Whereas, if this Honorable Court should pass only upon the questions certified to it, further delay will result, involving unnecessary hardship and injury to your petitioners.

Your petitioners further show that the questions certified to your Honorable Court did not involve a failure of jurisdiction in the United States District Court for the Eastern District of Pennsylvania, or in the United States Circuit Court of Appeals for the Third Circuit, but involved the question of the admissibility and effect to be given to certain reports and findings of

the Interstate Commerce Commission under the Act to Regulate Commerce and other Federal acts; and that the other matters and questions arising in this case are questions as to the effect, under said Act to Regulate Commerce and other Federal Acts, of certain evidence offered by plaintiffs and defendant in this case, and admitted by the learned trial judge, and of the charge of the said learned trial judge in submitting the case to the jury upon said evidence.

WHEREFORE, your petitioners pray that this Honorable Court may require that the whole record and cause be sent up to it for its consideration, and thereupon this Court may decide the whole matter in controversy in the same manner as if it had been brought before this Honorable Court for review by writ of error or appeal, and your petitioners, as in duty bound, will ever pray, etc.

W. F. JACOBY,
ISAAC C. WEBER,
Co-partners trading as W. F. Jacoby & Company.

By WM. A. GLASGOW, JR.,
Counsel.

CERTIFICATE.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

October Term, 1913. No. 1755.

PENNSYLVANIA RAILROAD CO.,
Plaintiff in Error,

vs.

W. F. JACOBY, *et al.*,
Defendants in Error.

And afterwards, to wit, on the 14th and 15th days of October, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

October Term, 1913. No. 1755.

PENNSYLVANIA RAILROAD CO.,

vs.

W. F. JACOBY & CO.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Before GRAY, BUFFINGTON and MCPHERSON, *Circuit Judges.*

In order to be guided to a proper decision of the controversy appearing upon the record of this writ of error, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court, and accordingly certifies the following questions, under Section 239 of the Judicial Code:

W. F. Jacoby & Co. owned and mined coal from land situated along the railroad of the Pennsylvania Railroad Co., and shipped the coal over the road in interstate commerce. They believed themselves to be injured by what they averred to be discriminating practices in the Railroad's distribution of cars. Thereupon, they made proper complaint of such practices to the Interstate Commerce Commission, and thereafter the Commission held hearings, and both parties pre-

sented evidence and arguments. In due course the Commission made two reports, finding *inter alia* that the practices complained of had been discriminating during the period in question, and ordering them to be abandoned. The Commission reported *inter alia* as follows:

> "We find that by reason of the discriminations asserted and set forth in our report in Jacoby vs. P. R. R. Co., 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907."

The Commission also made the following order:

> "It is ordered that the above-named defendant (Penna. R. R. Co.) be, and it is hereby authorized and directed to pay unto complainant W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Co., on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of six per cent. per annum from June 20, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

The Railroad Company did not comply with the order of reparation, whereupon Jacoby & Co. in due form prosecuted to trial in the District Court a petition under Section 16 of the Act to Regulate Interstate Commerce. At the trial the two reports of the Commission, including the foregoing finding and order, were admitted in evidence on behalf of Jacoby & Co., and were submitted to the jury.

The questions upon which the Circuit Court of Appeals desires instruction are these:

This being a suit for damages, under Section 16 of the Interstate Commerce Act,

(1) Were the two reports of the Commission as a whole (including the finding and the order quoted above) *prima facie* evidence of the matters therein contained?

(2) Were the finding and the order quoted above —or was either of them—*prima facie* evidence of themselves, or of itself, that the defendant had become liable to Jacoby & Co. in some amount by the discriminating practices referred to?

(3) If the finding and the order—either, or both, of them—were *prima facie* evidence that the defendant had become liable in some amount, were they—or was either of them—*prima facie* evidence also of the amount of such damage?

(Signed) GEORGE GRAY,
JOSEPH BUFFINGTON,
JOHN B. MCPHERSON,
Circuit Judges.

Feb. 26, 1914.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *sct.*
THIRD JUDICIAL CIRCUIT.

I, SAUNDERS LEWIS, JR., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Certificate of Questions to the Supreme Court of the United States in the case of Pennsylvania Railroad Company vs. W. F. Jacoby et al., No. 1755, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 12th day of
(Seal) March, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA. } *ss.*

W. F. JACOBY, being first duly sworn, says that he is one of the above petitioners; that he has read over the foregoing and annexed petition and knows well the contents thereof, and that the allegations thereof are true as he verily believes.

(Sgd). W. F. Jacoby

Sworn and subscribed to before me this 15th day of May, A. D. 1915.

(Sgd). Meyer Kraus

Commission Expires March 9, 1919.

Notary Public.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1914. No. 464.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, Co-partners, trading under the firm name of W. F. JACOBY & COMPANY,

Defendants-in-Error.

MOTION.

AND NOW, this 1st day of ~~May~~ June, 1915, come the Defendants-in-Error, above mentioned, by their counsel Wm. A. Glasgow, Jr., and move the Court to grant its writ of certiorari in the above case, directed

to the United States Circuit Court of Appeals for the Third Circuit, requiring that the whole record and cause above mentioned be sent up to this Court for its consideration, and in order that this Court may decide the whole matter in controversy in the same manner as if it had been brought up for review by writ of error or appeal.

(Sgd.) Wm. A. Glasgow, Jr.
Counsel for Defendants-in-Error.

NOTICE.

To John G. Johnson,
Attorney for the Pennsylvania Railroad Company.
Sir:

You will please take notice that on the 1st day of June, 1915, at twelve o'clock noon or as soon thereafter as counsel may be heard, the foregoing petition and motion accompanying brief will be submitted to the Supreme Court of the United States at its usual place for holding its sessions, in the Capitol at Washington, D. C., for its consideration and action, at which time and place you will please take such action in the premises as you may be advised.

(Sgd.) Wm. A. Glasgow Jr.
Counsel for Petitioners.

ADMISSION OF SERVICE.

Service of the foregoing petition, motion and brief is acknowledged this 18th day of May, 1915.

(Sgd.) John G. Johnson
Counsel for Plaintiff-in-Error.